1990

David Clark Adelman v. Mary Anne Adelman : Brief of Appellant

Utah Court of Appeals

Stephen L. Henriod; Henriod and Henriod; Attorney for Defendant/Respondent.
Gary J. Anderson; Michael K. Black; Andersen and Black; Attorneys for Plaintiff/Appellant.

IN THE UTAH COURT OF APPEALS

DOCKET NO. 900251 STATE OF UTAH

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DAVID CLARK ADELMAN,	)	
	)	
APPELLANT,	)	
	)	
VS.	)	Case No. 900251-CA
	)	Civil No. D82-2940
MARY ANNE ADELMAN a/k/a	)	
MARY ANNE LYNCH,	)	Judge Richard H. Moffat
	)	
RESPONDENT.	)	

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APPELLANT'S BRIEF

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Appeal from an Order of the Third Judicial District
Court of Salt Lake County
Honorable Richard H. Moffat

* * * * * * * * * * *

GARY J. ANDERSON, #4457
MICHAEL K. BLACK, #5038
ANDERSEN & BLACK
1327 South 800 East, Suite 300
Orem, Utah 84058
Telephone: (801) 225-1632
Attorneys for Plaintiff/
Appellant

STEPHEN L. HENRIOD
HENRIOD & HENRIOD
700 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
Attorney for Defendant/
Respondent

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STEPHEN L. HENRIOD
HENRIOD & HENRIOD
700 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
Attorney for Defendant/
Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. 78-2a-3(2)(g), and Article VIII, Section 3 and 4 of the Utah Constitution.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does Utah law allow for the retroactive modification of an Amended Decree upon the filing of an Order to Show Cause to secure insurance, medical and survivorship benefits, not included in the original Amended Decree?

2. Does Utah law allow for the modification of an amended decree as to issues involving insurance, medical and dental expenses and survivorship benefits without a showing of a material change in the circumstances of the parties?

3. Did the District Court error in failing to award interest at the rate of twelve percent (12%) per annum on the Appellant's share of the equity in the home from the date of Respondent's remarriage?

4. Did the District Court error in awarding the Respondent her attorney's fees and finding that Appellant had not complied with the prior orders of the trial court.

DETERMINATIVE RULES AND CASE LAW

Appellant contends that there are three prior statements of

the Court and one Rule from the Code of Judicial Administration and one statute that are dispositive of the issues on appeal.

The issue of whether Utah law allows for modification of an Amended Decree upon the filing of only an Order to Show Cause as opposed to a Petition is controlled by Rule 6-404, Code of Judicial Administration which provides as follows:

> (1) Proceedings to modify a decree of divorce shall be commenced by the filing of a petition to modify in the original divorce action. Service of the petition and summons upon the opposing party shall be in accordance with the requirements of Rule 4 of the Utah Rules of Civil Procedure. No request for a modification of an existing decree shall be raised by way of an order to show cause.

The issue relating to the propriety of retroactive modification of a decree is disposed of by U.C.A. 30-3-10.6(2) which states:

> A child or spousal support payment under a child support order may be modified with respect to any period during which a petition for modification is pending, but only from the date notice of that petition was given to the obligee, if the obligor is the petitioner, or to the obligor, if the obligee is the petitioner.

The issue is also controlled by the Court's announcement in Karren v. State Department of Social Services, 31 Utah Adv. Rep. 22, 716 P.2d 810 (1986), which clearly stands for the proposition that the District Court does not have jurisdiction to retroactively modify a decree of divorce.

The Court's decision in Marchant v. Marchant, 66 Utah Adv. Rep. 45, 743 P.2d 199 (Ct. App. 1988) is dispositive as the District Court's error in failing to award interest at twelve percent (12%) on the Appellant's equity in the home.

Porco v. Porco, 79 Utah Adv. 39, 752 P.2d 365 (Utah Ct. App. 1988) is controlling as to the necessity of establishing a substantial change of circumstances before a prior divorce decree may be amended.

STATEMENT OF THE CASE

I.

NATURE OF THE CASE

Defendant-Respondent, Mary Anne Lynch, signed an Affidavit on July 28, 1989, upon which an Order to Show Cause was issued requiring the Plaintiff-Appellant's appearance before Domestic Relations Commissioner Michael G. Allphin on September 7, 1989.

The Defendant-Respondent raised six issues in her Affidavit. First, why Plaintiff-Appellant should not be required to designate Defendant-Respondent for retirement and survivorship benefits; second, why judgment should not be granted in favor of Defendant-Respondent for unpaid alimony; third, why Plaintiff-Respondent should not be ordered to pay one-half of all medical and related expenses of the children from a time before the decree of divorce was entered; fourth, why the Court should not

determine the accounting to be used in assessing the amount of Plaintiff-Appellant's equity in the mutual home; fifth, why Plaintiff-Appellant should not provide proof of the existence of life insurance; and sixth, why Defendant-Respondent should not be awarded her costs and attorney's fees.

The hearing on the Order to Show Cause took place on September 7, 1989. Commissioner Allphin rendered his written recommendation on September 14, 1989, granting essentially all of Defendant-Appellant's requests. An objection was filed by Plaintiff-Appellant on September 25, 1989. Judge Richard H. Moffat signed the Order adopting the Commissioner's Recommendation on March 29, 1990.

Plaintiff-Appellant filed his Notice of Appeal on April 27, 1990.

II.

STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

The Amended Decree that was ultimately entered in this matter on August 8, 1985, was the result of peculiar circumstances. (R. 195-99.) The initial stipulated Findings, Conclusions and Decree were set aside as a result of Defendant-Respondent's Motion. (R. 41.) A two-day trial was held on May 24 and 25, 1984, resulting in Findings of Fact, Conclusions of Law and Decree of Divorce entered on November 8, 1984 (R. 95-101.)

Both parties filed objections which, upon hearing, culminated in the preparation and execution of the Amended Decree of Divorce on August 8, 1985. (R. 195).

As it relates to the relevant issues on appeal the Amended Decree awarded the Defendant-Respondent in accordance with Woodward v. Woodward, 656 P.2d 431 (Utah 1982), a portion of the Plaintiff-Appellant's retirement benefits. (R. 195-96.)

As it related to the family home, the terms of the Amended Decree fixed the Plaintiff-Appellant's equity at $34,636, which was to be paid in full (after subtracting one-half of the closing costs) by Defendant at the first of several designated events including Defendant's remarriage. (R. 198.)

The Decree of Divorce required each of the parties to carry health and accident insurance for the benefit of the children. (R. 100.)

The Decree awarded the Defendant $5,000.00 in alimony to be paid at the rate of $166.00 per month. (R. 99.)

Finally, the Decree required the Plaintiff to continue in force all existing life insurance policies. (R. 100.)

By Order to Show Cause heard by Domestic Relations Commissioner Michael G. Allphin on September 7, 1989, the Defendant, Mary Lynch, sought the following:

> 1. Judgment for unpaid alimony in the sum of $5,000.00, together with interest at

10% per annum.

2. Proof that Defendant was designated as a beneficiary of Plaintiff's retirement as required by the Decree.

3. An order requiring Plaintiff to designate Defendant as a beneficiary of Plaintiff's survivorship benefits not mentioned in the Decree.

4. Judgment for one-half of the children's medical, dental, and related expenses from before the entry of the Decree of Divorce.

5. Because of Defendant's remarriage, an accounting of monies due Plaintiff from the family home.

6. A citation of Plaintiff for contempt and her attorney's fees. (R. 230-36.)

Commissioner Allphin entered his written recommendation on September 14, 1989, granting substantially all of the requests of the Defendant. (R. 238-42.)

An Objection was filed by Plaintiff on September 25, 1989. (R. 244.)

Believing that an objection had not been filed, Judge Richard H. Moffat signed an order prepared by Defendant's counsel on November 3, 1989. (R. 293-96.)

Plaintiff filed a Motion and Memorandum to Strike Order and to require the return of all monies taken by Defendant pursuant to the Order of November 3, 1989. (R. 308-11.)

The trial court granted the Motion to Strike on December 21, 1989. (R. 315-16.)

Subsequently, Defendant filed an Objection to Decision and Motion for Recommendation (R. 318-20) and Plaintiff filed responsive memoranda (R. 389-416.)

Judge Moffat, after reviewing the Recommendation, Objection and memoranda, entered his ruling by Minute Entry on March 14, 1989. (R. 419-20.) The Order prepared pursuant to the Minute Entry was signed on March 29, 1990. (R. 422-23.)(included as pp. 19-26 of the Addendum).

The Notice of Appeal was filed on April 27, 1990. (R. 432.)

SUMMARY OF ARGUMENT

The trial court erred in requiring the Plaintiff-Appellant to designate the Defendant-Respondent as beneficiary of FDIC survivorship benefits in that 1) survivorship benefits were not awarded in the original decree or the amended decree; 2) Defendant did not file a petition to modify the decree; 3) the trial court did not hear evidence to determine a change of circumstances; and 4) under federal regulations, Defendant is explicitly not eligible for these benefits.

The Court erred in requiring the Plaintiff to undertake any further action as it relates to naming the Defendant as a beneficiary of his FDIC retirement benefits in that the assignment had already been made.

The Court erred in awarding judgment against the Plaintiff in the sum of $2,734.42, plus interest representing one-half (1/2 of the children's medical and related expenses since the entry of the decree in this matter because 1) the decree and amended decree required the Plaintiff only to maintain insurance; 2) the Defendant did not file a petition to modify; 3) the Court did not take any testimony as to change in circumstances; and 4) there is no legal basis allowing the Court to retroactively modify a decree and include thereon amounts incurred before the decree was entered.

The Court erred in requiring an ongoing obligation on the part of the Plaintiff-Appellant to pay one-half (1/2) of the medical expenses without the required filing of a petition to modify and a hearing regarding the circumstances of the parties.

The Court erred in failing to award the Plaintiff interest at 12% on his fixed equity in the home from the date of Defendant's remarriage until now. Additionally, it was error to allow the Defendant to withhold payment of the Plaintiff's equity until other portions of the order were complied with.

Finally, the Court erred in awarding the Defendant-Respondent $1,000.00 in attorneys fees in that no need was established by the Defendant and the Affidavit of Defendant's counsel was defective and improper.

ARGUMENT

POINT I

THE COURT ERRED IN AWARDING DEFENDANT-RESPONDENT SURVIVORSHIP BENEFITS.

A. Appellant's FDIC Retirement and FDIC Survivorship Benefits are different and distinct Programs.

It is essential in determining the issues on appeal to understand the difference between Plaintiff-Appellant's retirement program and the right to designate a person for survivor benefits. If one meets the requirements set out by the federal government, the employee is entitled to a retirement benefit that is payable monthly or under certain circumstances, in lump sum. The survivor benefit is the monthly or in some instances a lump sum benefit that a designated person is entitled to receive upon the death of the retiree.

The Code of Federal Regulations is explicitly clear as to the difference between retirement benefits and survivor benefits. 5 Code of Federal Regulations, Ch. 1, Sec. 831.1703 (included in pages 1 through 9 of the Addendum) states as follows:

> . . . "Employee retirement benefits" means employees' and Members' annuities and refunds of retirement contributions but does not include survivor annuities or lump-sum payments made pursuant to Section 8342(c) through (f) of Title 5, United States Code. (emphasis added)

5 Code of Federal Regulations, Chapter 1, Appendix B to Subpart Q of Part 831 (included in pages 1 through 9 of the Addendum) specifically outlines the types of survivor annuities that are available. Under the heading of Insurable Interest Annuities, the guidelines state as follows:

> Two types of potential survivor annuities may be provided by retiring employees to cover former spouses. Section 8339(j) of Title 5, United States Code provides for reduced annuities to provide: "former spouse annuities." Section 8339(k) of Title 5, United States Code provides for "insurable interest annuities." These are distinct benefits, each with its own advantages.
>
> **A.** OPM will enforce state court orders to provide Section 8339(j) annuities. These annuities are less expensive and have fewer restrictions than insurable interest annuities, but the former spouse's interest will automatically terminate upon remarriage before age 55. To provide a section 8339(j) annuity, the order must use terms such as "former spouse annuity", "Section 8339(j) annuity," or "survivor annuity."
>
> B. OPM will not enforce state court orders to provide "insurable interest annuities" under Section 8339(k). These annuities may only be elected at the time of retirement by any retiring employee who is not retiring under the disability provision of the law, and who is in good health. The election must also be eliminated to provide a survivor annuity for a spouse acquired after a retirement. The parties might seek to provide this type of annuity interest if the non-employee spouse expects to remarry before age 55, if the employee expects to remarry a younger second spouse before retirement, or if another former spouse has already been awarded a Section 8339(j) annuity. However, the state court will have to provide its own remedy if the employee is not eligible for or does not make the election. OPM will not enforce the order. Language including the words "insurable interest" or

referring to Section 8339(k) will be interpreted as providing for this type of survivor benefit.

B. Survivorship Benefits were not awarded to Respondent in the Amended Decree.

Paragraph 8 of the Amended Decree is explicit as to the award made to the Defendant:

> 8. RETIREMENT. Each party is to retain their own full interest in their own social security. Plaintiff has a retirement program with the FDIC as a federal employee. Defendant is to receive a share of that, directly from FDIC if possible based on the following formula: she is awarded one-half (1/2) plaintiff's retirement multiplied by as numerator, 13, the number of years the parties were married while plaintiff was accumulating such retirement, and divided by as denominator the total number of years that plaintiff works under the retirement plan. In this the court follows the formula used in Woodward v. Woodward, 656 P.2d 431 (Utah 1982). As an illustration, if on retirement plaintiff receives $2,000.00 per month and retires after 30-years employment, plaintiff would receive 13/30 of one-half of the $2,000.00, or $433.33 per month. Plaintiff is directed to forthwith use reasonable efforts to have defendant named and designated on his FDIC retirement benefits as a direct payee of those benefits in accordance with the terms of this Decree.

(R. 195-6).

The Amended Decree awarded the Defendant-Respondent the right to become a direct payee of a specified amount of the retirement annuity. There is nothing contained in paragraph eight of the amended decree that even hints at an award of survivorship benefits.

C. The Court may not modify the Amended Decree without the filing of a petition and requisite showing of a change of circumstances.

Rule 6-404 of the Code of Judicial Administration is clear as to the process to be employed by a person seeking to amend or modify a prior decree. The Rule states as follows:

> Proceedings to modify a divorce decree shall be commenced by the filing of a petition to modify in the original divorce action. Service of the petition and summons upon the opposing party shall be in accordance with the requirements of Rule 4 of the Utah Rules of Civil Procedure. No request for a modification of an existing decree shall be raised by way of an order to show cause. (emphasis added)

There can be little argument that the Defendant-Appellant seeks by the order to show cause to modify the terms of the Amended Decree and to allow a modification would contravene the Rule.

Aside from failing to comply with the mandatory procedures concerning a petition to modify, there was no showing or even contention of a material change in the circumstances of the parties warranting an award of survivorship benefits. This Court, in Porco v. Porco, 752 P.2d 365 (Utah App. 1988), stated explicitly:

> To modify the decree now, plaintiff must show "a substantial change of circumstances occurring since the entry of the decree and not contemplated in the decree itself." Naylor v. Naylor, 700 P.2d 707, 710 (Utah 1985). See also Jeppson v. Jeppson, 684 P.2d 69, 70

(Utah 1984); Christiansen v. Christiansen, 667 P.2d 592, 594 (Utah 1983). . . .

Id. at 367.

The record in this case is devoid of any evidence supporting the contention that there has been a change in the circumstances of the parties not contemplated at the time of the entry of the Amended Decree. Absent a substantial change of circumstances, the doctrine of res judicata applies. The Court in Throckmorton v. Throckmorton, 767 P.2d 121 (Utah App. 1988), explained the application of the doctrine in divorce proceedings:

> The doctrine of res judicata applies in divorce actions. Jacobsen v. Jacobsen, 703 P.2d 303, 305 (Utah 1985). "When there has been an adjudication, it becomes res judicata as to those issues which were either tried and determined, or upon all issues which the party had a fair opportunity to present and have determined in the other proceeding." Id. (footnote omitted) (Mendenhall v. Kingston, 610 P.2d 1287, 1289 (Utah 1980)). However the application of res judicata is unique in divorce actions because of the equitable doctrine which allows courts to reopen alimony, support, or property distributions if the moving party can demonstrate a substantial change of circumstances since the matter was previously considered by the Court. See e.g., Thompson v. Thompson, 709 P.2d 360 (Utah 1985).

Throckmorton, supra, at 123.

Survivorship benefits existed at the time the amended decree was entered in this case and, therefore, the failure of Defendant to argue that issue at the time of trial or secure it by subsequent motion or appeal, warrants the imposition of res

judicata as to the issue. In Throckmorton, supra, the Court of Appeals noted that Court's are particularly hesitant to disturb property distributions. Throckmorton, supra, at 123.

In applying the law to the facts, the Court of Appeals in Throckmorton, supra, specifically found that Mrs. Throckmorton's claim to 1/2 of the retirement benefits was barred by the doctrine of res judicata even though the Supreme Court decision of Woodward v. Woodward, 656 P.2d 431 (Utah 1982), recognizing retirement benefits as a marital asset, was decided after the initial Throckmorton divorce action. The Respondent in this action seeks to undertake the same task addressed in the Throckmorton case. Respondent seeks to claim survivorship benefits, which are separate and apart from retirement benefits that were not litigated at the time of the initial Decree and further claims the right to survivorship benefits without the need of showing a substantial change of circumstance and without the filing of a petition.

The Court recently decided the matter of Ostler v. Ostler, 131 Utah Adv. Rep. 15 (filed March 13, 1990), addressing the same issue and upheld its ruling in Throckmorton, supra, and specifically held:

> In the instant case, appellant has articulated no change of circumstance justifying a re-evaluation of the original property division. Appellant's claim of lack of knowledge of the retirement benefits does not

> constitute such a change. The only other possible change of circumstance is Woodward I's legal recognition of retirement benefits as marital assets. However, the decree of divorce was entered more than four years before the issuance of Woodward I and the modification order was entered a year before the issuance of Throckmorton. Inasmuch as Woodward I is to be given prospective application only, there is no appropriate basis on which to divide respondent's retirement account. . . .

Id. at 17.

Inasmuch as the trial court did not have jurisdiction to amend the decree in the absence of the filing of a petition, and inasmuch as no change in the circumstances of the parties has been plead or proven, there is simply no basis for the award of a separate property benefit not included in the amended decree.

D. Federal regulations and law preclude the award of survivorship benefits to the Defendant-Respondent.

Pages 10 through 18 of the Addendum represent copies of the relevant sections of the Code of Federal Regulations governing survivor annuities (5 CFR Subpart F, Section 831.601-831.629). As noted in subpart F, survivorship benefits may only be awarded if the Plaintiff-Appellant's present spouse gave her consent and secondly, only if the Defendant-Respondent had not remarried before age 55. In this case, the Plaintiff-Appellant's wife is not subject to the jurisdiction of the Court and would not give her consent and secondly, the Defendant has remarried.

Although the Court, if, in fact, the Decree had been modified, could order Mr. Adelman to make certain payments, the Court would obviously lose jurisdiction over Mr. Adelman upon his death. Then, the issue is, whether or not the Court by its prior orders could compel the payment of survivorship benefits to the Defendant-Respondent. Clearly, the regulations and handbook indicate that absent the consent from Mr. Adelman's present wife and given the fact that the Defendant has remarried, there is simply no legal way to secure survivor benefits to the Defendant. Realistically, Defendant-Respondent could take out a life insurance policy upon Mr. Adelman's life and secure the same benefit.

E. The Court's findings are inadequate to support the order entered by the trial court.

The Utah Supreme Court and the Court of Appeals has repeatedly rendered decisions noting the obligation of the trial court on making specific findings on all material issues. The Court in Carlton v. Carlton, 756 P.2d 86 (Utah App. 1988), stated:

> The trial court must make findings on all material issues, and its failure to do so constitutes reversible error "unless the facts and the record are 'clear, uncontroverted, incapable of supporting only a finding in favor of the judgment'". Acton v. J.B. Deliran, 737 P.2d 996, 999 (Utah 1987) (quoting Kinkella v. Baugh, 660 P.2d 233, 236 (Utah 1983)). In addition, the findings must be sufficiently detailed

> and consist of enough subsidiary facts to reveal the steps the court took to reach its conclusion on each factual issue presented. Acton, 737 P.2d at 999; Lee v. Lee, 744 P.2d 1378, 1380 (Utah Ct. App. 1987).

Id. at 87, 88.

On this same point, the Utah Supreme Court ruled in Pennington v. Pennington, 711 P.2d 254 (Utah 1985):

> We acknowledge that the findings are meager, and strongly advise Respondent's attorney, who drafted them, to take the necessary effort in the future to prepare more specific and substantive findings. We cannot overemphasize the importance of well-written findings to support modifications of divorce decrees. See Tucky v. Tucky, 649 P.2d 88 (Utah 1982). "One of the reasons for this requirement is to explain the basis for the modification so the agreed party can determine whether to challenge it and so the Appellate Court can properly review it on appeal." Shioji v. Shioji, 671 P.2d 135, 136 (Utah 1983). Conclusive findings give little indication of the trial court's reasons for reaching its result. Such findings m a y invite unnecessary expensive appeals which in turn delay final resolution of the issues and impede judicial economy.

Id. at 256.

As it relates to the facts of this case, there are a multitude of omissions of essential findings of fact. First, there is no finding as it relates to the jurisdiction of the court to consider the question of survivor benefits. The order lacks any determination by the trial court that the award of survivor benefits constituted a modification or was somehow linked to the amended decree. Both the Appellant and the Court of Appeals is left to speculate as to the basis upon which the

trial court entertained the order to show cause as it relates to survivorship benefits.

Secondly, the record fails to disclose any finding as to the relationship between retirement benefits and survivorship benefits. The Court entered no finding as it relates to the term over which the retirement benefits awarded to the Defendant-Respondent would be paid. There is no finding as to whether or not the retirement benefits awarded to the Defendant-Respondent under the terms of the amended decree would terminate upon the Plaintiff-Appellant's death. The record is devoid of any finding that the trial court intended that, if, in fact, retirement benefits payable to the Defendant terminated upon Plaintiff's death, that the Court intended the Defendant-Respondent to have survivorship benefits or, in essence, a life insurance policy.

Third, the record is devoid of any findings with regard to how survivorship benefits can be awarded in light of the Defendant's remarriage and the absence of any consent on the part of Plaintiff's present wife.

Because of the absence of any findings, it is impossible to determine the process by which the Court evaluated the issue with regard to survivorship benefits. On the state of the record as it now exists, there is simply no basis for a determination that the Court had jurisdiction to determine the issue and that is was

proper to make any award to Defendant-Respondent of survivorship benefits.

POINT II

THE TRIAL COURT ERRED IN MAKING FURTHER ORDERS WITH REGARD TO THE PLAINTIFF-APPELLANT'S RETIREMENT

Paragraph 1 of the Amended Decree of Divorce entered on August 8, 1985, modified paragraph 8 of the Decree of Divorce as it related to the issue of retirement. (Record 195-96.) After awarding the Defendant retirement benefits in accordance with Woodward, supra, the Court then stated:

> Plaintiff is directed to forthwith use reasonable efforts to have defendant named and designated on his FDIC retirement benefits as a direct payee of those benefits in accordance with the terms of this decree.

(R. 196.)

Paragraph 1 of the Order entered by Judge Richard H. Moffat on May 29, 1990, states in pertinent part as follows:

> That the plaintiff shall, on or before October 1, 1989, assign to the defendant one-half (1/2) of his FDIC retirement benefits based upon the thirteen (13) year period referred to in the Decree. The amount of the benefit shall be calculated by using the number thirteen (13) as the numerator over the total number of years the Plaintiff works as the denominator, times the benefit, divided by two (2). . . .

(R. 425-26.) (attached as pp. 19-26 of the Addendum)

The Court's record in this case will reflect the habit of the Defendant-Respondent to send letters to the Court directly, by-passing counsel for both sides and to send the Court copies of

her correspondence with the lawyers involved in the matter. (R. 200-29.)

By letter dated October 27, 1987, the Defendant-Respondent wrote to Debra Gonza with the FDIC. The Defendant sent a copy to the FDIC of the Amended Decree of Divorce signed by Judge Conder and specifically requesting a copy of the retirement program. (R. 228-29) Defendant received a response by letter dated March 30, 1988, from Emanuel Smith at the allotment section of the annuitant services branch which specifically outlined the information that needed to be sent to the government to properly record her ordered interest in the retirement. The letter indicated that a certified copy of the divorce decree needed to be sent together with "a statement signed by the spouse seeking payments, or his/her attorney verifying that the order has not been amended." (R. 225) Lastly, the government requested information concerning the Plaintiff such as his full name, date of birth, civil service claim number, and social security number. (R. 225)

By letter dated April 14, 1988, the Defendant-Respondent, who was the person who was seeking payments, sent all of the required information. (R. 222-24)

In paragraph 5 of her affidavit in support of the order to show cause, the Defendant alleged as follows:

> 5. The Plaintiff has refused and failed to provide proof to the Defendant that he has designated her either as a beneficiary of the retirement program or for survivorship benefits under the retirement program.

(R. 234.)

The Defendant did not disclose to the Court at the hearing in this matter that, in fact, nearly one year prior to the signing of the affidavit in support of the order to show cause, she had communicated with the appropriate government agencies, had received the criteria necessary to record her interest in the Plaintiff's retirement, and, in fact, had done so. She further failed to disclose to the Court that it was not the Plaintiff who was the person required by the government to record that interest. Instead, as indicated in the correspondence recited above, the recording of the retirement interest required a statement signed by the spouse seeking payments.

In the Court's ruling, the Court required the Plaintiff to assign to the Defendant one-half (1/2) of his retirement benefits without any requisite finding that the interest of the Defendant in the Plaintiff's retirement had not already been recorded. Further, there is no finding or evidence in the file that any assignment from the Plaintiff was necessary. As is standard with regard to qualified domestic relations orders and assignments of retirement interest, it is not necessary for the

employee to sign an assignment of retirement benefits. The general requirement is only that a certified copy of the Court Order or qualified domestic relations order be sent to the employer or retirement trustee.

5 Code of Federal Regulations, Section 831.1705 outlines specifically how the application by the former spouse for retirement benefits is to be accomplished (included in pages 1 through 9 of the Addendum). The requirements of the Code of Federal Regulations is identical to the requirements set out in the letter of Emanuel Smith dated March 30, 1988 (R. 225). Accordingly, all of the information required by the Code of Federal Regulations has been provided and the assignment has been made.

The significance of the issue is that the Court in paragraph 7 of its Order, states as follows:

> That there is reason to believe the plaintiff is in contempt of this Court for not complying with the terms of the Decree of Divorce, however, the matter of contempt shall be reserved until after October 1, 1989, to permit the plaintiff to purge himself of any contempt by complying with this Order. If this Order is not complied with in full by the plaintiff, the matter shall be referred to the district judge for an evidentiary hearing and determination of the issue of contempt.

R. 427-28.

Further, the Court in paragraph 6 of its Order, specifically held that the Plaintiff's equity from the home and property,

totalling nearly $30,000.00, need not be disbursed to him until such time as he demonstrated compliance with the terms of the Order and further, restricted the award of interest to the Plaintiff on that equity to a time period after he has fully complied with the Order.

As outlined in the previous point, the trial court has an obligation to make specific findings and in this case, the Court did not make any findings as it related to the need for any further action with regard to the assignment of retirement benefits to the Defendant. The Defendant was unfair in not disclosing all of the facts to the trial court at the time the Order to Show Cause was entered in this matter and in signing the Affidavit in support of the order to show cause. Unfortunately, the Court used that as a mean to tie up the Plaintiff's home equity monies and as a basis for the finding as it related to contempt.

POINT III

THE TRIAL COURT ERRED IN AWARDING JUDGMENT AGAINST PLAINTIFF-APPELLANT FOR UNREIMBURSED MEDICAL AND DENTAL EXPENSES.

A. The Decree and Amended Decree required only that Plaintiff maintain insurance on the minor children.

Paragraph 5 of the Decree of Divorce states as follows:

> Each party is to carry health and accident insurance for the benefit of the children when available at their

> place of employment in order to make sure of maximum coverage for the children.

(R. 100.)

There is simply no requirement contained in the Decree or Amended Decree that required the Plaintiff to pay any portion of the unreimbursed health, dental and associated costs of the minor children. Inasmuch as the trial in this case took place in 1984, there were no child support guidelines at that time. As the Court understands, it was customary for the trial court to hear evidence with regard to the incomes and expenses of the parties. On the financial declarations used in 1984 and 1985, each of the parties were required to estimate their medical and dental expenses. When this matter was tried, the Defendant prepared and submitted to the Court a financial declaration. On the financial declaration she listed the outstanding medical, dental and related expenses that were still outstanding and further, under Section 6, indicated the names and ages of the children living with her and estimated in her monthly living expenses the costs of medical and dental treatment. (Financial Declaration is an unnumbered part of the exhibit packet).

It is axiomatic that the Plaintiff is legally responsible as a non-custodial parent for the support of his minor children to the extent ordered by the Court. In this case, there is no order requiring the Plaintiff to undertake any further financial

contributions for his children other than the insurance and $900.00 of child support per month.

B. The Court did not have jurisdiction to modify the Decree of Divorce.

As previously cited, Rule 6-404 of the Code of Judicial Administration specifically requires the filing of a Petition in any effort to modify a divorce decree. Without the filing of the Petition, there was absolutely no basis upon which to grant a judgment in favor of the Defendant-Respondent against the Plaintiff-Appellant.

A review of paragraph 3 of the order entered by the trial court in this matter, reveals the following language:

> That the Defendant be awarded a judgment in the amount of $2,734.42, which is one-half (1/2) of the unreimbursed medical and dental expenses of the minor children since 1982, plus interest at ten percent (10%) per annum from the date each bill was paid. (See Exhibit "A" for a schedule of payment dates)

(R. 426.)

In paragraph 4 of the same order, the trial court stated:

> The Plaintiff is ordered to pay one-half (1/2) of all future unreimbursed medical and dental expenses of the minor children within thirty (30) days after notification by Defendant.

(R. 427.)

Aside from the fact that the Court had no jurisdiction, based upon the failure to file a petition to modify the decree,

the Court awarded to the Defendant one-half (1/2) of the unreimbursed expenses since 1982, although the Amended Decree in this case was not entered until November of 1984. In essence, the trial court went back behind the Decree of Divorce and awarded Defendant costs and expenses that were incurred before this matter was tried. There is absolutely no legal basis established in this case allowing the Court to relitigate matters and debts that were fully disclosed and dealt with by the trial court in May of 1984.

One other point needs to be made with regard to the jurisdiction of the trial court to enter orders regarding medical and related expenses. Utah Code Annotated, 78-45-7.1 (1990) does state as follows:

> When no prior court order exists or the prior court order makes no specific provision for the payment of medical and dental expenses for dependent children, the court in its order:
>
> 1. Shall include a provision assigning responsibility for the payment of reasonable and necessary medical and dental expenses for the dependent children; and
>
> 2. May include a provision requiring the purchase and maintenance of appropriate health, hospital and dental care insurance for those children if insurance coverage is or becomes available at a reasonable cost.

However, the fact that the section requires, in a modification hearing, the inclusion of medical and dental expenses as a consideration with regard to child support and

related issues, does not relieve the Respondent from filing a petition and establishing a change in the circumstances of the parties. Utah Code Ann. 78-47-7.2 (b)(1990) states as follows:

> Neither the enactment of the guidelines or any consequent impact of the guidelines on existing child support orders constitute a substantial or material change in circumstances as a ground for modification of the court order existing prior to July 1, 1989.

In summary, the decree and amended decree in this matter did not require the Plaintiff to pay any portion of the unreimbursed medical and related expenses. The Court did not have jurisdiction, without the filing of a petition, to hear matters relating to modification of the decree and even if a petition had been filed, the Court did not have any authority to go behind the decree and amended decree and award monies allegedly expended by the Plaintiff two years prior to the time the case was tried. Finally, the Court does not have jurisdiction to include an order regarding health and related expenses of the children pursuant to the new child support guidelines until a petition to modify has been filed and a change of circumstances established.

C. <u>The Court does not have the power to make retroactive modifications of divorce decrees.</u>

Even assuming that a petition for modification had been filed and a substantial change in the circumstances of the

parties had been established, the Court did not have authority to award relief prior to the date the petition was filed.

Utah Code Ann. 30-3-10.6(2) (1989 as amended), provides as follows:

> A child or spousal support payment under a child support order may be modified with respect to any period during which a petition for modification is pending, but only from the date notice of that petition was given to the obligee, if the obligor is the petitioner, or to the obligor if the obligee is the petitioner.

The payments to the Defendant-Respondent to reimburse her for medical and related expenses is certainly a form of child support and Appellant urges is the code section is applicable in this case. Of course, the Supreme Court, prior to the legislative action, decided the case of Karren v. State Department of Social Services, 716 P.2d 810 (1986). In the decision, the Supreme Court has explicitly held that when a Court modifies an existing support obligation, the modification cannot be applied retroactively, but only prospectively. Id. at 813.

One final point needs to be made. As with the lack of candor that the Defendant showed with regard to the retirement issue and the letters written to government agencies, the Defendant failed to disclose in these proceedings the fact that she knew and understood at the time the Amended Decree was entered that unreimbursed medical and dental expenses were not

made a part of the decree. The Defendant-Respondent sent copies to Judge Conder of her correspondence with her lawyer. In the Court's file is a letter dated December 3, 1985, to Sam King, from the Defendant, wherein she explicitly discusses on the first page of that letter the fact that the unreimbursed expenses were not covered and requested further action. (R. 204-5, 216-16). Knowing that no provision was made for unreimbursed expenses, neither Defendant nor her counsel included a request for the division of unreimbursed expenses in any of the numerous objections filed to the original decree of divorce. (R. 115-23, 125-133, 136-143.)

For the reasons outlined above, the inclusion in the order of the provisions relating to unreimbursed medical and related expenses should be stricken, the amount of the judgment together with interest should be reimbursed to the Plaintiff.

POINT IV

THE COURT ERRED WITH REGARD TO THE ACCOUNTING ON THE MARITAL HOME AND PROPERTY

Paragraph 2 of the Amended Decree of Divorce entered on August 8, 1985, modified paragraph 12 of the original Divorce Decree. The paragraph set out in the amended decree recites as follows:

> Defendant is awarded the parties' home at 965 Peace Blossom, Sandy, Utah, described as Lot 11, Peach Blossom Estates No. 1, according to the official Plat

> thereof recorded in the office of the County Recorder, Salt Lake County, Utah. Defendant is to assume the existing obligation on the home of $20,228.00. Plaintiff is awarded an equity in the home payable to him when the youngest child becomes 18, and has also graduated from high school, provided that that (sic) graduation be in an uninterrupted academic course, Defendant remarries or cohabits with a male person in the home, or she moves from the home. Defendant's equity is $34,636.00, which the Court has determined by finding a market value of the home of $89,500.00 and subtracting from that the existing mortgage balance due. Plaintiff is to receive this in full at the time of the happening of the first of the foregoing events, less costs of resale or refinancing in order to pay him, which costs should be borne equally with the Defendant. Defendant is given leave to refinance the home or borrow money against it as she sees fit, provided that Plaintiff's above-stated equity interest be in position second only to the present outstanding $20,000.00 mortgage.

(R. 197-98.)

In the Defendant-Respondent's affidavit in support of the order to show cause, she admits to remarrying on July 23, 1987. (R. 234). By the clear wording of the amended decree, the Plaintiff-Appellant's equity was "payable to him" upon the first of a number of events, which in this case, was the Defendant's remarriage.

In the Court's order relating to the home and property, the trial court stated as follows:

> 6. The Plaintiff is entitled to equity from t h e marital home in the amount of $34,636.00,less one-half (1/2) of the cost of sale. That the judgments awarded to the Defendant shall be used to offset said equity owed the Plaintiff, and that the remaining balance of equity owed to the Plaintiff not be disbursed to

> Plaintiff until such time as he demonstrates compliance with the terms of this Order. Plaintiff shall be entitled to interest from the date this Order is fully complied with to the date he actually receives said funds. Plaintiff is ordered to immediately execute a quit-claim deed to Defendant regarding said property.

(R. 427.) (included as pp. 19-26 of the Addendum)

Of course, the judgments awarded to the Defendant-Respondent included the unreimbursed medical and related expenses which was referred to in Point III. The other judgment was for unpaid alimony in the amount of $5,000.00, plus interest. (see paragraph 2 of the Court Order dated March 29, 1990.) (R. 426.) It should be noted, however, that the reason the Plaintiff did not pay the alimony was because the parties were negotiating the issue of trading alimony for a portion of the Plaintiff's equity in the home and property. Those ongoing discussions are memorialized by another letter prepared by Defendant-Respondent to her lawyer dated January 16, 1986 (R. 201-2) and letter to Plaintiff's attorney from Defendant-Respondent dated April 24, 1986. (R. 219.)

The first claimed error with regard to the Court Order regarding the marital home is the failure of the trial court to award interest on the Plaintiff-Appellant's equity in the home from July 23, 1987. The Court of Appeals has recently considered the right of a party to interest on property settlements. In

Marchant v. Marchant, 743 P.2d 199 (Utah App. 1987). In addressing the issue, Judge Davidson speaking for the Court stated as follows:

> The Decree indicates that any deficiency in what is actually received from the sale of the family farm and what is to be paid to plaintiff relative to the property division, accrues interest at a rate of eight percent (8%) per annum. Utah Code Ann. Section 15-1-4 (1986) requires that judgments, other than those based on a contract in which interest has been agreed upon by the parties, "shall bear interest at the rate of twelve percent (12%) per annum." This Court, in Stroud v. Stroud, 738 P.2d 649 (Utah App. 1987), held that the statutory rate of interest was the minimum interest allowable on child support arrearages. We stated that the specific language of Section 15-1-4 applies to the provisions of Utah Code Ann. Section 30-3-5(1) (1984) whereby the trial court enters orders "in relation to the children, property, and parties . . . ." Therefore, we hold that the trial judge erred in not awarding interest on the property award in an amount of twelve percent (12%) per annum. (footnote omitted) As previously stated, plaintiff's award of defendant's retirement fund was to accrue interest at the rate of eight percent (8%) per annum. If the award had been correct, it too should have accrued interest at the statutory rate.

Id. at 207. Appellant contends that Marchant, supra, is dispositive and that the Plaintiff-Appellant is entitled to interest at twelve percent (12%) from the date of the Defendant's remarriage.

The second error claimed by Appellant with regard to the marital home and property relates to the Court Order that the equity not be paid to the Plaintiff until he demonstrates compliance with the terms of the order and further restricting

the application of interest. It is respectfully submitted that those conditions were, in fact, modifications to the Decree of Divorce which specifically set forth when the money from the home and property was payable to the Plaintiff-Appellant. Again, the Plaintiff-Appellant contends that the Court was without jurisdiction to modify the Decree of Divorce based upon the failure to file a petition and based upon any specific findings of fact relating to the issue establishing a change in the circumstances of the parties.

Inasmuch as the terms of the order restrict the Plaintiff-Appellant from obtaining the money until he designates the Defendant-Respondent for survivorship benefits, pays medical and related expenses for which he is not obligated, that part of the order should be stricken.

In conclusion, Appellant request that the Court's Order with regard to the home and property be reversed, that the Court award him $34,636.00, less one-half (1/2) of the costs of the sale, together with interest from the date of the Defendant's remarriage, to the date it is actually paid. Plaintiff-Appellant does not argue that the alimony, together with interest, is a legitimate deduction from his equity.

POINT V

THE COURT ERRED WITH REGARD TO THE AWARD OF ATTORNEY'S FEES IN THIS CASE.

Based upon the Order to Show Cause proceeding, the Court in paragraph 8 of the Order entered on March 29, 1990, awarded the Defendant attorney's fees in the sum of $1,000.00. (R. 428.) (included as pp. 19-26 of the Addendum.) It is Appellant's contention that the award of attorney's fees was error. The Utah Court's have been active with regard to setting forth the criteria necessary to award attorney's fees. One of the most recent statements is contained in Porco v. Porco, 752 P.2d 365 (Ct. of App. 1988). Judge Garff speaking for the Court stated as follows:

> In divorce actions, an award of attorney's fees must be supported by evidence that the amount awarded was reasonable and that the party receiving the award was reasonably in need. Huck v. Huck, 734 P.2d 417, 419 (Utah 1986). "Relevant factors of reasonableness include 'the necessity of the number of hours dedicated, the reasonableness of the rate charged in light of the difficulty of the case, and the result accomplished, and the rates, normally charged for divorce actions in the community'". Beals v. Beals, 682 P.2d 862, 864 (Utah 1984) (quoting Kerr v. Kerr, 610 P.2d 1380, 1384-85 (Utah 1980); see also Talley v. Talley, 739 P.2d 83, 84 (Utah Ct. of App. 1987).

Id. at 368.

In Porco, supra, the Court specifically addressed the issue of the "need" element:

> Evidence of Defendant's need for assistance in paying her attorney's fees unfolded during the entire trial, so special proceedings specifically concerned with the termination of her need is not necessary. The Utah Supreme Court similarly concluded in Newmeyer v. Newmeyer, 745 P.2d 1276, 1279 (Utah 1987), stating: "because ample evidence of [the wife's] financial condition was before the Court, we reject [the husband's] argument that the trial court's finding of need was unsupported by the evidence."

Id. at 368.

With that framework, an examination of the record in this case indicates there is not sufficient court findings for evidence upon which to base an award of attorney's fees. The affidavit of the Defendant-Respondent in support of the order to show cause has only one section pertaining to attorney's fees and that is paragraph 13 which states as follows:

> Affiant petitions the Court to set a time and place wherein the Plaintiff is required to appear and show cause of why contempt should not be entered against him for his willful failure to comply with the terms in the Divorce Decree, why he should not be required to pay at least $1,000.00 attorney's fees for requiring Defendant to bring this matter to the attention of the Court and for such other and further relief as the Court deems equitable.

(R. 235-36.)

Although Mr. Henriod, Defendant-Respondent's attorney, filed an Affidavit with regard to his fees, there has been no affidavit or submission of proof regarding the Defendant-Respondent's need to justify an award of attorney's fees.

As it relates to the sufficiency of the proof with regard to the attorney's fees, attention should be directed to counsel's affidavit signed on October 30, 1989. (R. 288-89). In paragraph 3 of his affidavit, counsel indicates that the services he performed by the Defendant included client conferences, correspondence to Plaintiff, correspondence to Plaintiff's counsel, preparation of an Order to Show Cause and Affidavit, attendance at an Order to Show Cause hearing, preparation of Proposed Order, preparation of Stipulation and Order, and conferences with a title company. Mr. Henriod states in his Affidavit that he spent fifteen (15) hours in performing that work, but does not state how much time was spent on each particular aspect. It would be totally improper to award attorney's fees in this case that were spent in preparing a version of a stipulation which was never entered in the case or discussing matters with the title company. There is nothing in the affidavit that indicates that the time spent was reasonable or that it was all necessary to perform the explicit task. Further, although Mr. Henriod indicates his hourly charge is $120.00, there is no statement that this is the fee commonly charged in the community for divorce actions.

Lastly, it is submitted that when a party has a lawyer prepare an order to show cause and affidavit and makes an

appearance in front of a Domestic Relations Commissioner, it is totally improper to ask for attorney's fees for client conferences, which by the terms of Mr. Henriod's affidavit, were not necessarily associated with the specific issues involved in this matter. Further, to claim attorney's fees for correspondence sent to the Plaintiff before the initiation of the order to show cause relating to settlement of the case, is likewise improper.

The attorney's fee award should be stricken and those monies should be reimbursed to the Plaintiff-Appellant together with interest.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the Court should strike paragraph 1 of the Order entered by Judge Richard H. Moffat on March 29, 1990 on the basis that the retirement benefits awarded to the Defendant-Respondent pursuant to the terms of the Amended Decree have been properly assigned and notification to the appropriate government agency was made prior to the bringing of the Order to Show Cause. Further, based upon the fact that survivor benefits were improperly included in the Court's Order, that portion should be likewise stricken, and the Court of Appeals should explicitly hold that survivorship benefits are different and distinct benefits from the retirement

benefit and that the inclusion of survivor benefits in the recent Court Order constituted an attempt to amend the Decree without the filing of a petition and the necessary showing of a change of circumstances.

The Court should strike paragraphs 3 and 4 of Judge Moffat's Order entered on March 29, 1990 on the basis that the attempt to impose upon the Plaintiff-Appellant the obligation to pay 1/2 of the unreimbursed medical and dental expenses since 1982 was improper. It is respectfully submitted that the Court should find that the Orders with regard to unreimbursed medical and dental expenses was an attempt to modify the Decree without the necessary filing of a petition. The Court should further determine that if in fact the petition was filed, the trial court would only have jurisdiction to award such medical and dental expenses that were incurred from the filing of the petition to the date the matter is heard. Appellant requests that the Court strike paragraph 4 regarding the ongoing obligations to pay medical and dental expenses on the basis that it likewise was a modification of the Decree without the proper filing of a petition and necessary establishment of a change in the circumstances of the parties. Inasmuch as the Defendant-Respondent has already taken from the Plaintiff-Appellant's share of the equity of the home, the $2,734.42 together with interest,

the Court should order that those amounts be forthwith repaid to the Plaintiff-Appellant from the Defendant-Respondent, together with interest at the rate of 12% per annum.

As it relates to the marital home, Plaintiff-Appellant requests that the Court determine, in accordance with the Amended Decree that his equity in the home is $34,636.00 less 1/2 of the cost of sale, and further, less the amount of alimony previously adjudicated by the Court. Further, Plaintiff-Appellant requests that the Court order that the amount arrived at by using the formula set out above should be paid to the Plaintiff-Appellant together with interest at the rate of 12% per annum from the date of the Defendant-Respondent's remarriage. Appellant requests an Order that the inclusion in paragraph 6 of the right of the Defendant-Respondent to withhold payment to the Plaintiff was in error and that no restrictions are attached to the requirement that the Defendant forthwith pay to the Plaintiff the amount obtained from employing the formula set out above.

Appellant respectfully requests that paragraph 7 as it relates to the finding that Plaintiff has not complied with the terms of the Decree of Divorce be stricken, and further, that the award of attorney's fees as outlined in paragraph 8 should likewise be stricken.

DATED this 6 day of September, 1990.

GARY J. ANDERSON, ESQ.
Attorney for Plaintiff/Appellant

MAILING CERTIFICATE

I hereby certify that on the 7 day of September, 1990, I mailed 4 copies of the Brief to the foregoing, postage prepaid, to:

Stephen L. Henriod, Esq.
HENRIOD & HENRIOD
Attorney for Defendant
700 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

Jodi Westphal

890\ADELMAN.BC

ADDENDUM

number of annuitants who have completed allotment authorizations.

(i) OPM, in its discretion, shall recover from the allottee, the incremental costs of making allotments.

(j) OPM, in its sole discretion, may terminate an allottee's participation in the allotment program described by this subpart at any time in accordance with its agreement with the allottee.

Subpart P—[Reserved]

Subpart Q—Court Orders Affecting Civil Service Retirement Benefits

AUTHORITY: 5 U.S.C. 8347.

SOURCE: 50 FR 20077, May 13, 1985, unless otherwise noted.

§ 831.1701 Purpose.

This subpart regulates the Office of Personnel Management's adjudication of claims arising out of State court orders that affect civil service retirement benefits. The Office of Personnel Management (OPM) must comply with qualifying court orders, decrees, or court-approved property settlements in connection with divorces, annulments of marriage, or legal separations of employees, Members, or retirees that award a portion of a former employee's or Member's retirement benefits or a survivor annuity to a former spouse. This subpart prescribes the procedures to be followed by—

(a) A former spouse when applying for benefits based on a court order under sections 8345(j) or 8341(h) of title 5, United States Code; and

(b) The Associate Director in honoring court orders and in making payment to the former spouse.

§ 831.1702 Relation to other regulations.

(a) Part 581 of this Chapter contains information about garnishment of Government payments including salaries and civil service retirement benefits.

(b) Parts 294 and 297 of this chapter and § 831.106 contain information about disclosure of information from OPM records.

(c) Subpart F of this part contains information about entitlement to survivor annuities.

(d) Subpart T of this part contains information about entitlement to lump-sum death benefits.

(e) Parts 870, 871, 872, and 873 of this chapter contain information about coverage under the Federal Employees' Group Life Insurance Program.

(f) Part 890 of this chapter contains information about coverage under the Federal Employees Health Benefits Program.

(g) Section 831.109 contains information about the administrative review rights available to a person who has been adversely affected by an OPM action under this subpart.

§ 831.1703 Definitions.

In this subpart:

"Associate Director" means the Associate Director for Compensation in the OPM or an OPM employee officially authorized to act on his or her behalf.

"Court order" means any judgment or property settlement issued by or approved by any court of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Northern Mariana Islands, or the Virgin Islands, and any Indian court in connection with, or incident to, the divorce, annulment of marriage, or legal separation of a Federal employee or retiree.

"CSRS" means subchapter III of chapter 83 of title 5, United States Code.

"Employee retirement benefits" means employees' and Members' annuities and refunds of retirement contributions but does not include survivor annuities or lump-sum payments made pursuant to section 8342 (c) through (f) of title 5, United States Code.

"Former spouse" means (1) in connection with a court order affecting employee retirement benefits, a living person whose marriage to an employee, Member, or retiree has been subject to a divorce, annulment, or legal separation resulting in a court order; or (2) in connection with a court order awarding a former spouse annuity, a living person who was married for at least 9 months to an employee, Member, or retiree who performed at

least 18 months of creditable service in a position covered by CSRS and whose marriage to the employee was terminated prior to the death of the employee, Member, or retiree.

"Former spouse annuity" means a former spouse annuity as defined in § 831.603.

"Gross annuity" means the amount of a self-only annuity less only applicable survivor reduction, but before any other deduction.

"Member" means a Member of Congress.

"Net annuity" means the amount of annuity payable after deducting from the gross annuity any amounts that are (1) owed by the retiree to the United States, (2) deducted for health benefits premiums pursuant to section 8906 of title 5, United States Code, and §§ 891.401 and 891.402 of this title, (3) deducted for life insurance premiums pursuant to section 8714a(d) of title 5, United States Code, (4) deducted for Medicare premiums, or (5) properly withheld for Federal income tax purposes, if amounts withheld are not greater than they would be if the individual claimed all dependents to which he or she was entitled.

"Qualifying court order" means a court order that meets the requirements of § 831.1704.

"Retiree" means a former employee or Member who is receiving recurring payments under CSRS based on service by the employee or Member. "Retiree," as used in the subpart, does not include a current spouse, former spouse, child or person with an insurable interest.

"Self-only annuity" means the recurring payment to a retiree who has elected not to provide a survivor annuity to anyone.

§ 831.1704 Qualifying court orders.

(a) A former spouse is entitled to a portion of an employee's retirement benefits only to the extent that the divison of retirement benefits is expressly provided for by the court order. The court order must divide employee retirement benefits, award a payment from employee retirement benefits, or award a former spouse annuity.

(b) The court order must state the former spouse's share as a fixed amount, a percentage or a fraction of the annuity, or by a formula that does not contain any variables whose value is not readily ascertainable from the face of the order or normal OPM files.

(c)(1) For purposes of payments from employee retirement benefits, OPM will review court orders as a whole to determine whether the language of the order shows an intent by the court that the former spouse should receive a portion of the employee's retirement benefits directly from the United States.

(i) Orders that direct or imply that OPM is to make payment of a portion of employee retirement benefits, or are neutral about the source of payment, will be honored unless the retiree can demonstrate that the order is invalid in accordance with § 831.1709.

(ii) Orders that specifically direct the retiree to pay a portion of employee retirement benefits to a former spouse (and do not contain language to show the court intends payment from the Civil Service Retirement System) will be honored unless the retiree objects to direct payment by OPM within the 30-day notice period prescribed in § 831.1708, but will not be honored even if the retiree raises only a general objection to payment by OPM within that 30-day notice period.

(2) For purposes of awarding a former spouse annuity, the court order must either state the former spouse's entitlement to a survivor annuity or direct an employee, Member, or retiree to provide a former spouse annuity.

(d) For purposes of affecting or awarding a former spouse annuity, a court order is not a qualifying court order whenever—

(1) The marriage was terminated before May 7, 1985; or

(2)(i) The marriage was terminated on or after May 7, 1985; and

(ii) The employee or Member retired under CSRS before May 7, 1985; and

(iii)(A) The employee or Member had elected not to provide a current spouse annuity for that spouse at the time of retirement; or,

(B) In the case of a post-retirement marriage, the annuitant had not elected to provide a survivor annuity for that spouse before May 7, 1985.

(e)(1) For purposes of affecting or awarding a former spouse survivor annuity, a court order modifying a decree of divorce or annulment, or modifying any court order or court approved property settlement incident to a decree of divorce or annulment will not be honored if it is issued after the employee or Member dies or retires

(2) A court order concerning a survivor annuity for a former spouse will not be honored if it is issued after the death of the employee, Member, or retiree involved.

[50 FR 20077, May 13, 1985, as amended at 51 FR 31936, Sept. 8, 1986, 52 FR 3210, Feb. 3, 1987]

§ 831.1705 Applications by former spouse.

(a) A former spouse (personally or through a representative) must apply in writing to be eligible for benefits under this subpart. No special form is required.

(b) The application letter must be accompanied by—

(1) A certified copy of the court order granting benefits under CSRS; and

(2) A statement that the court order has not been amended, superseded, or set aside, and

(3) Identifying information concerning the employee, Member, or retiree such as his or her full name, claim number, date of birth, and social security number, if available; and

(4) The mailing address of the former spouse.

(c) When payments are subject to termination upon remarriage, no payment shall be made until the former spouse submits to the Associate Director a statement on the form prescribed by OPM certifying—

(1) That a remarriage has not occurred; and

(2) That the former spouse will notify the Associate Director within 15 calendar days of the occurrence of any remarriage; and

(3) That the former spouse will be personally liable for any overpayment to him or her resulting from a remarriage. The Associate Director may subsequently require recertification of these statements

§ 831.1706 Amounts payable.

(a) Money held by an executive agency or OPM that may be payable at some future date is not available for payment under court orders unless all of the conditions necessary for payment of the money to the former employee or Member have been met, including, but not limited to—

(1) Separation from a covered position in the Federal service; and

(2) Application for payment of the money by the former employee or Member; and

(3) The former employee's or Member's immediate entitlement to payment of the money subject to the order.

(b) Waivers of employee or Member annuity payments under the terms of Section 8345(d) of title 5, United States Code, exclude the waived portion of the annuity from availability for payment under a court order if such waivers are postmarked before the expiration of the 30-day notice period provided by § 831.1708.

(c) Payment under a court order may not exceed—

(1) In cases involving employee or Member annuities, the net annuity.

(2) In cases involving lump-sum payments (refunds), the amount of the lump-sum credit.

(3) In cases involving former spouse annuities, the amount provided in § 831.614.

(d) In cases in which court orders award former spouse annuities—

(1) Except as provided in paragraph (d)(2) of this section, former spouse annuities based on qualifying court orders will commence and terminate in accordance with the court order.

(2) A court order will not be honored to the extent it would require an annuity to commence prior to the day after the employee, Member, or retiree dies, or the first day of the second month beginning after the date on which OPM receives written notice of the court order together with the additional information required by § 831.1705. Further, a court order will not be honored to the extent it re-

quires an annuity to be terminated contrary to section 8341(h)(3)(B) of title 5, United States Code.

(3) A court order will not be honored to the extent it is inconsistent with any joint designation or waiver previously executed under § 831.607 with respect to the former spouse involved.

[50 FR 20077, May 13, 1985, as amended at 51 FR 31936, Sept. 8, 1986]

§ 831.1707 Preliminary review.

(a)(1) Upon receipt of a court order and documentation required by § 831.1705 affecting the future civil service retirement benefits of an employee or Member who is living and has not applied for benefits under CSRS, the Associate Director will notify the former spouse that OPM has received the court order and documentation. The court order and documentation will be filed for further review when the employee or Member dies or funds become available under § 831.1706.

(2) When OPM has received a court order and documentation required by § 831.1705 affecting an employee or Member who retires, dies, or applies for a lump-sum benefit, the Associate Director will determine whether the court order is a qualifying court order under § 831.1704.

(3) Upon receipt of a court order and necessary documentation required by § 831.1705 affecting employee retirement benefits that are available under § 831.1706 or awarding a former spouse annuity to a former spouse of an employee who retired under CSRS or died, the Associate Director will determine whether the court order is a qualifying court order under § 831.1704.

(b) Upon preliminary determination that the court order is qualifying, the Associate Director will give the notifications required by § 831.1708.

(c) Upon preliminary determination that the court order is not qualifying, the former spouse will be notified of the basis for the determination and the right to reconsideration under § 831.109.

§ 831.1708 Notifications.

(a) In a case in which the court order affects employee retirement benefits:

(1) The Associate Director will notify the employee, Member, or retiree that a court order has been received that appears to require that a portion of his or her retirement benefits be paid to a former spouse and provide the employee, Member, or retiree with a copy of the court order. The notice will inform the former employee or Member—

(i) That OPM intends to honor the court order; and

(ii) Of the effect that the court order will have on the former employee or Member's retirement benefits; and

(iii) That no payments will be made to the former spouse for a period of 30 days from the notice date to enable the former employee or Member to contest the court order.

(2) The Associate Director will notify the former spouse—

(i) That OPM intends to honor the court order; and

(ii) Of the amount that the former spouse is entitled to receive under the court order, and in cases that award a portion of the benefits on a percentage basis or by a formula, how the amount was computed; and

(iii) That payment is being delayed for a period of 30 days to give the former employee or Member an opportunity to contest the court order.

(b) In a case in which the court order awards a former spouse annuity—

(1) The Associate Director will notify the retiree, if living, or, if the employee, Member, or retiree is dead, his or her surviving spouse, or the person entitled to the lump-sum death benefit under section 8342 of title 5, United States Code, if possible, that a court order has been received that requires the payment of a former spouse annuity. The notice will include a copy of the court order. The notice will state—

(i) That OPM intends to honor the court order; and

(ii) The effect it will have on the potential retirement benefit of the person receiving the notice; and

(iii) That any objection to honoring the court order must be filed within 30 days from the notice date.

(2) The former spouse will be notified—

(i) That OPM intends to honor the court order; and

(ii) Of the amount of survivor annuity that he or she will be entitled to receive and how the amount was computed; and

(iii) That anyone adversely affected has a period of 30 days in which to contest the court order.

(c) In a case in which the court order affects employee retirement benefits and awards a former spouse annuity all of the notices under paragraphs (a) and (b) of this section will be provided.

§ 831.1709 Decisions.

(a)(1) When the individual does not respond within the 30-day notice period provided for by § 831.1708, the court order will be honored in accordance with the notification.

(2) When a timely response to the notification is received, the Associate Director will consider the response. The former spouse's claim will be denied and the former spouse will be notified of the right to request reconsideration under § 831.109 whenever is is shown that—

(i) The court order is not a qualifying court order; or

(ii) The court order is inconsistent with a contemporaneous or subsequent court order.

(b) If any person who may lose benefits if OPM honors the court order objects to payment based on the validity of the court order and the record contains reasonable support for the objection, he or she will be granted 30 days to initiate legal action to determine the validity of the objection. If funds are available under § 831.1706 and evidence is submitted that legal action had been started before the 30 days have expired, money will continue to be withheld, but no payment will be made to the former spouse pending judicial determination of the validity of the court order.

§ 831.1710 Lump-sum credits.

Payment of the lump-sum credit to a former employee or Member will be subject to court orders in accordance with § 831.2009.

§ 831.1711 Effective dates.

(a)(1) The provisions of this subpart apply to any employee retirement benefits regardless of the date of issuance of the court order or the date when the employee or Member retires.

(2) The Associate Director will not increase the amount apportioned from current retirement benefits to satisfy an arrearage due the former spouse unless the court order states the amount of the arrearage and directs that it be paid from the employee retirement benefit. However, the Associate Director will honor the terms of a new or revised court order that either increases or decreases the former spouse's entitlement. These changes will be prospective only.

(3) Benefits payable to a former spouse from a retiree's annuity begin to accrue no earlier than the beginning of the month after receipt of a qualifying court order and the documentation required by § 831.1705, and terminate no later than the last day of the month before the death of the retiree.

(b)(1) The provisions of this subpart concerning former spouse annuities apply only with respect to a former spouse of an employee, Member, or retiree who retires or dies while employed in a position covered by CSRS on or after May 7, 1985, or a former spouse whose marriage to an employee, Member, or retiree is terminated on or after May 7, 1985, regardless of the date the employee separates from a position covered by CSRS.

(2) The survivor annuity for a former spouse commences and terminates in accordance with the court order. However, a court order will not be honored to the extent it would require an annuity to commence before—

(i) The day after the employee, Member, or retiree dies; or

(ii) The first day of the second month beginning after OPM receives the court order, together with such

additional information required by § 831 1705, whichever is later. Further, a court order will not be honored to the extent it requires an annuity to be terminated contrary to section 8341(h)(3)(B) of title 5, United States Code.

[50 FR 20077, May 13, 1985, as amended at 51 FR 31936, Sept 8, 1986]

§ 831.1712 Death of the former spouse.

(a) When the former spouse predeceases the retiree, and further employee retirement benefits that would have been subject to the court order are payable, the Associate Director will seek guidance from the court upon whose order the award to the former spouse was based about the proper disposition of the former spouse's share.

(b) The request for guidance from the court will—

(1) Explain the circumstances that led to the request; and

(2) Inform the court of limitations on payments under § 831.1713 applicable to the case; and

(3) Notify the court of the effect of its failure to provide guidance.

(c) While OPM is awaiting guidance from the court, the retiree will be paid only his or her share of the annuity. The former spouse's share may be disbursed only in accordance with paragraphs (d) and (e) of this section.

(d)(1) If no response (or an inadequate response) is received from the court within 60 days from the date of receipt of the request for guidance, the full annuity will be restored to the retiree effective on the date of the first annuity check due after the death of the former spouse.

(2) Disbursement will be made only after the completion of any reconsideration and appeals procedures required by § 831.109.

(e) Payment of all or part of the former spouse's share may be made only to one of the following—

(1) The retiree; or

(2) A child or children of the retiree (or a court-appointed representative for the benefit of such children); or

(3) The court (or other State, county or municipal agency which serves as a collecting and disbursing agent for the court).

(f) The request for guidance required by this section will be sent by certified mail, return receipt requested, addressed to the clerk of the court. Copies of the request for guidance will be sent by certified mail, return receipt requested, to the retiree and to the representative of the estate of the former spouse (if an address is available).

§ 831.1713 Limitations.

(a) Employee retirement benefits are subject to apportionment by court order only while the former employee or Member is living. Payment of apportioned amounts will be made only to the former spouse and/or the children of the former employee or Member. Payment will not be made to any of the following:

(1) The heirs or legatees of the former spouse; or

(2) The creditors of the former employee or Member, or the former spouse; or

(3) Other assignees of the former employee or Member, or the former spouse.

(b) The amount of payment under this subpart will not be less than one dollar and, in the absence of compelling circumstances, will be in whole dollars.

(c) In honoring and complying with a court order, the Associate Director will not disrupt the scheduled method of accruing retirement benefits or the normal timing for making such payment, despite the existence of a special schedule of accrual or payment of amounts due the former spouse.

(d) Payments from employee retirement benefits under this subpart will be discontinued whenever the retiree's annuity payments are suspended or terminated. If annuity payments to the retiree are restored, payment to the former spouse will also resume.

(e) Since the former spouse is entitled to payments from employee retirement benefits only while the former employee or Member is living, the former spouse is personally liable for any payments from employee retirement benefits received after the death of the retiree.

§ 831.1714 Guidelines on interpreting court orders.

As circumstances require, OPM will publish in the FEDERAL REGISTER a notice of the guidelines it uses in interpreting court orders. Upon publication of the notice in the FEDERAL REGISTER of such guidelines, they will become an appendix to this subpart.

§ 831.1715 Liability.

OPM is not liable for any payment made from employee retirement benefits pursuant to a court order if such payment is made in accordance with the provisions of this subpart.

§ 831.1716 Receipt of multiple court orders.

In the event that OPM receives two or more qualifying court orders—

(a) When there are two or more former spouses, the court orders will be honored in the order in which they were issued to the maximum extent possible under §§ 831.614 and 831.1706.

(b) Where there are two or more court orders relating to the same former spouse, the one issued last will be honored.

§ 831.1717 Cost-of-living adjustments.

In cases where the court order apportions a percentage of the employee retirement benefit, the Associate Director will initially determine the amount of proper payment. That amount will be increased by future cost-of-living increases unless the court directs otherwise.

§ 831.1718 Settlements.

The former spouse may request that an amount be withheld from the retirement benefits that is less than the amount stipulated in the court order. This lower amount will be deemed a complete fulfillment of the obligation of OPM for the period in which the request is in effect.

APPENDIX A TO SUBPART Q OF PART 831—GUIDELINES FOR INTERPRETING STATE COURT ORDERS DIVIDING CIVIL SERVICE RETIREMENT BENEFITS

UNITED STATES OF AMERICA

OFFICE OF PERSONNEL MANAGEMENT

COMPENSATION GROUP

Guidelines for Interpreting State Court Orders Dividing Civil Service Retirement Benefits

Recent inquires and controversies resulting from ambiguous court orders seeking to divide civil service retirement benefits have demonstrated a need for written guidelines explaining the interpretation which the Office of Personnel Management will place on terms and phrases frequently used in dividing benefits. These guidelines are intended not only for the use of the Office of Retirement Programs, but also for the legal community as a whole, with the hope that by informing attorneys, in advance, about the manner in which the Office of Personnel Management will interpret terms written into court orders, the resulting orders will be more carefully drafted, using the proper language to accomplish the aims of the court.

I. Cost-of-Living and Salary Adjustments

A. Unless the court directly and unequivocally orders otherwise, decrees which divide annuities either on a percentage basis or by use of a formula will be interpreted as subject to adjustment for cost-of-living and salary adjustments occurring after the issuance of the decree.

B. On the other hand, decrees which award a former spouse a specific dollar amount from the annuity will be interpreted as excluding cost-of-living and salary adjustments unless the court expressly orders their inclusion.

C. Orders which contain both a formula or percentage instruction and a corresponding fixed dollar amount will be interpreted as including the fixed amount only as the court's estimate of the initial amount of payment. The formula or percentage instruction will control in cases where conflicting instructions appear.

D. A formula containing an instruction to calculate the former spouse's share effective at the time of divorce will not be interpreted to prevent cost-of-living or salary adjustments. To award a fixed dollar amount based on the rate of annuity which would have been paid if retirement occurred at the date of divorce, the decree must either state the dollar amount of the award or explain

with sufficient clarity that salary adjustments, as well as service, after the date of *the decree are to be disregarded in computing* the former spouse's share.

II. Types of Annuity

A Gross annuity will be interpreted as the amount shown as gross annuity on civil service annuity master record printouts, i.e., the annuity payable after any applicable survivor deduction but before any other deduction.

B To divide an annuity before any applicable survivor deduction the decree must contain language to the effect that the division is to be made on the life rate annuity, or the annuity unreduced for survivor benefit, or equivalent language. A division of "gross annuity" will not accomplish this purpose.

C. Net annuity or disposable annuity will be interpreted to mean net annuity as defined in § 831.1703.

D. Orders which fail to state the type of annuity which they are dividing will be interpreted as dividing gross annuity (defined above).

III. Calculating Time

A. The smallest unit of time which will be used in computing formula in a decree is a month.

1. This policy is based on the provision of section 8332 of title 5, United States Code, which allows credit for service for years or twelfth parts thereof. Requests to calculate smaller units of time will not be honored.

2. Smaller periods of time stated in terms of decimal fractions of a year contained in a decree will be limited in application to simple numerical operations performed using the extra precise number. Time calculations by the Office of Personnel Management will be no more precise than years and twelfth parts. For example, the share of a former spouse awarded a portion of the annuity equal to ½ of the fraction whose numerator is 12.863 years and whose denominator is the total service on which the annuity is based would be computed by taking ½ of the quotient obtained by dividing 12.863 by the total service measured *in years and twelfth parts.*

B. The term "military service" will generally be interpreted to include only periods of service within the definition of military service contained in section 8331(13) of title 5, United States Code, i.e., active duty military service. Civilian service with military organizations will not be included as "military service," except where the exclusion of such civilian service would be manifestly *contrary to the intent of the court order.*

C. When a decree contains a formula for dividing annuity which requires computation of service and unused sick leave has been used in the annuity computation, the amount of credit attributable to the unused *sick leave will be computed as service if the* formula instructs the use of "creditable service" (or other phrase using "credit" or its equivalent), but will exclude the time attributable to unused sick leave if the formula is based on "years of service" or "total service." Credit for unused sick leave always accrues on the date of separation for immediate retirement; it is never apportioned over the time when earned.

IV. Distinguishing Between Divisions of Annuity and Contributions

A. Orders which are unclear about whether they are dividing an annuity or contribution will be interpreted as dividing an annuity.

B Orders using "annuities," "pensions," "retirement benefits," or similar terms will be interpreted as dividing an annuity and whatever other employee benefits became payable, such as refunds. Orders which divide "contributions," "deductions," "deposits," "retirement accounts," "retirement fund," or similar terms will be limited to division of the amount which the employee has paid into the Civil Service Retirement and Disability Fund.

V. Orders Directing the Annuitant To Make Payment

A. Orders which specifically direct the retiree to pay a portion of retirement benefits to a former spouse will be honored unless the retiree objects to direct payment by the Office of Personal Management, but will not be honored even if the retiree raises only a general objection to payment by the Office of Personnel Management.

B. Orders which direct or imply that the Office of Personnel Management is to make payment of a portion of retirement benefits, or are neutral about the source of payment, will be honored unless the retiree can demonstrate that the order is invalid.

APPENDIX B TO SUBPART Q OF PART 831—GUIDELINES FOR INTERPRETING STATE COURT ORDERS AWARDING SURVIVOR ANNUITY BENEFITS TO FORMER SPOUSES

UNITED STATES OF AMERICA

OFFICE OF PERSONNEL MANAGEMENT

COMPENSATION GROUP

Guidelines for Interpreting State Court Orders Awarding Survivor Annuity Benefits to Former Spouses

Recent inquiries and controversies resulting from ambiguous court orders seeking to divide civil service retirement benefits have demonstrated a need for written guidelines explaining the interpretation which the Office of Personnel Management (OPM) will place on terms and phrases frequently used in awarding survivor benefits. These guidelines are intended not only for the use of the Office of Retirement Programs, but also for the legal community as a whole, with the hope that by informing attorneys, in advance, about the manner in which OPM will interpret terms written into court orders, the resulting orders will be more carefully drafted, using the proper language to accomplish the aims of the court.

I. Insurable Interest Annuities

Two types of potential survivor annuities may be provided by retiring employees to cover former spouses. Section 8339(j) of title 5, United States Code, provides for reduced annuities to provide "former spouse annuities." Section 8339(k) of title 5, United States Code, provides for "insurable interest annuities." These are distinct benefits, each with its own advantages.

A. OPM will enforce State court orders to provide section 8339(j) annuities. These annuities are less expensive and have fewer restrictions than insurable interest annuities but the former spouse's interest will automatically terminate upon remarriage before age 55. To provide a section 8339(j) annuity, the order must use terms such as "former spouse annuity," "section 8339(j) annuity," or "survivor annuity."

B. OPM will not enforce State court orders to provide "insurable interest annuities" under section 8339(k). These annuities may only be elected at the time of retirement by a retiring employee who is not retiring under the disability provision of the law and who is in good health. The election may also be eliminated to provide a survivor annuity for a spouse acquired after retirement. The parties might seek to provide this type of annuity interest if the non-employee spouse expects to remarry before age 55, if the employee expects to remarry a younger second spouse before retirement, or if another former spouse has already been awarded a section 8339(j) annuity. However, the State court will have to provide its own remedy if the employee is not eligible for or does not make the election. OPM will not enforce the order. Language including the words "insurable interest" or referring to section 8339(k) will be interpreted as providing for this type of survivor benefit.

C. In orders which contain internal contradictions about the type of annuity, such as "insurable interest annuity under section 8339(j)," the section reference will control.

[51 FR 31936, Sept. 8, 1986]

Subpart R—Agency Requests to OPM for Recovery of a Debt from the Civil Service Retirement and Disability Fund

AUTHORITY: 5 U.S.C. 8347.

SOURCE: 51 FR 45443, Dec. 19, 1986, unless otherwise noted.

§ 831.1801 Purpose.

This subpart prescribes the procedures to be followed by a Federal agency when it requests the Office of Personnel Management (OPM) to recover a debt owed to the United States by administrative offset against money due and payable to the debtor from the Civil Service Retirement and Disability Fund (the Fund). This subpart also prescribes the procedures that OPM must follow to make these administrative offsets.

§ 831.1802 Scope.

This subpart applies to agencies, employees, and Members, as defined by § 831.1803.

§ 831.1803 Definitions.

For purposes of this subpart, terms are defined as follows—

"Act" means the Federal Claims Collection Act of 1966 as amended by the Debt Collection Act of 1982 and implemented by 4 CFR 101.1 *et seq.*, the Federal Claims Collection Standards (FCCS).

"Administrative offset" means withholding money payable from the Fund to satisfy a debt to the United States under 31 U.S.C. 3716.

"Agency" means (a) an Executive agency as defined in section 105 of

scribe, may exempt an air traffic controller having exceptional skills and experience as a controller from automatic separation until that controller becomes 61 years of age

(c) When a department or agency lacks authority and wishes to secure an exemption from automatic separation for one of its employees other than a Presidential appointee, beyond the age(s) provided by statute, i.e., age 60 for a law enforcement officer or firefighter, age 61 for an air traffic controller, and age 62 for an employee of the Alaska Railroad in Alaska or an employee who is a citizen of the United States employed on the Isthmus of Panama by the Panama Canal Commission, the department or agency head shall submit a recommendation to that effect to OPM

(1) The recommendation shall contain

(i) A statement that the employee is willing to remain in service,

(ii) A statement of facts tending to establish that his/her retention would be in the public interest,

(iii) The period for which the exemption is desired, which period may not exceed 1 year, and,

(iv) The reasons why the simpler method of retiring the employee and immediately reemploying him or her is not being used

(2) The recommendation shall be accompanied by a medical certificate showing the physical fitness of the employee to perform his or her work

(d) OPM may approve an exemption only before the automatic separation date applicable to the employee. For this reason, the department or agency shall forward the recommendation to OPM at least 30 days before this separation date

[33 FR 12498, Sept. 4, 1968, as amended at 34 FR 593, Jan. 16, 1969; 48 FR 38786, Aug. 26, 1983]

§ 831.504 Retirement based on involuntary separation

(a) *General.* An employee who would otherwise be eligible for retirement based on involuntary separation from the service is not entitled to an annuity under section 8336(d)(1) of title 5, United States Code, if the employee has declined a reasonable offer of another position.

(b) *Criteria for reasonable offer.* For the purposes of determining entitlement to annuity based on such involuntary separation, the offer of a position must meet all of the following conditions to be considered a reasonable offer:

(1) The offer must be made in writing.

(2) The employee must meet established qualification requirements, and

(3) The offered position must be—

(i) In the employee's agency, including an agency to which the employee with his or her function is transferred in a transfer of functions between agencies;

(ii) Within the employee's commuting area as defined in § 831.502(a) of this subpart, unless geographic mobility is a condition of the employee's employment,

(iii) Of the same tenure and work schedule, and

(iv) Not lower than the equivalent of two grades or pay levels below the employee's current grade or pay level, without consideration of the employee's eligibility to retain his or her current grade or pay under Part 536 of this chapter or other authority. In movements between pay schedules or pay systems, the representative rate of the grade or pay level that is two grades below that of the current position shall be compared with the representative rate of the grade or pay level of the offered position. For this purpose, "representative rate" has the meaning given that term in § 536.102 of this chapter.

[48 FR 38786, Aug. 26, 1983]

Subpart F—Survivor Annuities

AUTHORITY: 5 U.S.C. 8347. Section 831.621 also issued under section 201(d) of the Federal Employees Benefits Improvement Act of 1986, Pub. L. 99-251.

SOURCE: 50 FR 20070, May 13, 1985, unless otherwise noted.

§ 831.601 Purpose

This subpart explains the annuity benefits payable in the event of the death of employees, retirees, and Members, the actions that employees, retirees, Members, and their current spouses, former spouses, and eligible children must take to qualify for survivor annuities, and the types of evidence required to demonstrate entitlement to provide survivor annuities or qualify for survivor annuities.

§ 831.602 Relation to other regulations

(a) Subpart Q of this part contains information about former spouses' entitlement to survivor annuities based on provisions in court orders or court-approved property settlement agreements.

(b) Subpart T of this part contains information about entitlement to lump sum death benefits.

(c) Parts 870, 871, 872 and 873 of this chapter contain information about coverage under the Federal Employees Group Life Insurance Program.

(d) Part 890 of this chapter contains information about coverage under the Federal Employees Health Benefits Program.

(e) Section 831.109 contains information about the administrative review rights available to a person who has been denied a survivor annuity or an opportunty to make an election under this subpart.

(f) Subparts C and U of this part contain information about service credit deposits by survivors of employees or Members.

[50 FR 20070, May 13, 1985, as amended at 51 FR 31931, Sept. 8, 1986]

§ 831.603 Definitions

As used in this subpart—

"CSRS" means subchapter III of chapter 83 of title 5, United States Code.

"Current spouse" means a living person who is married to the employee, Member, or retiree at the time of the employee's, Member's, or retiree's death.

"Current spouse annuity" means a recurring benefit under CSRS that is payable (after the employee's, Member's, or retiree's death) to a current spouse who meets the requirements of § 831.618.

"Deposit" means a deposit required by the Civil Service Retirement Spouse Equity Act of 1984, Pub. L. 98-615, 98 Stat. 3195. "Deposit," as used in this subpart does not include a service credit deposit or redeposit under sections 8334(c) or (d) of title 5, United States Code.

"First regular monthly payment" means the first annuity check payable on a recurring basis (other than an estimated payment or an adjustment check) after OPM has initially adjudicated the regular rate of annuity payable under CSRS and has paid the annuity accrued since the time of retirement. The "first regular monthly payment" is generally preceded by estimated payments before the claim can be adjudicated and by an adjustment check (including the difference between the estimated rate and the initially adjudicated rate).

"Former spouse" means a living person who was married for at least 9 months to an employee, Member, or retiree who performed at least 18 months of creditable service in a position covered by CSRS and whose marriage to the employee was terminated prior to the death of the employee, Member, or retiree. Except in §§ 831.621 and 831.622, "former spouse" includes only persons who were married to an employee or Member on or after May 7, 1985, or who were the spouse of a retiree who retired on or after May 7, 1985, regardless of the date of termination of the marriage.

"Former spouse annuity" means a recurring benefit under CSRS that is payable to a former spouse after the employee's, Member's, or retiree's death.

"Fully reduced annuity" means the recurring payments under CSRS received by a retiree who has elected the maximum allowable reduction in annuity to provide a current spouse annuity and/or a former spouse annuity or annuities.

"Insurable interest annuity" means the recurring payments under CSRS to a retiree who has elected a reduction in annuity to provide a survivor annuity to a person with an insurable interest in the retiree.

"Marriage" means a marriage recognized in law or equity under the whole law of the jurisdiction with the most significant interest in the marital

status of the employee, Member, or retiree unless the law of that jurisdiction is contrary to the public policy of the United States If a jurisdiction would recognize more than one marriage in law or equity, the Office of Personnel Management (OPM) will recognize only one marriage but will defer to the local courts to determine which marriage should be recognized

'Member means a Member of Congress

Net annuity means the net annuity as defined in § 831 1703

'Partially reduced annuity means the recurring payments under CSRS to a retiree who has elected less than the maximum allowable reduction in annuity to provide a current spouse annuity or a former spouse annuity

'Qualifying court order" means a court order that meets the qualifications of § 831 1704

Retiree" means a former employee or Member who is receiving recurring payments under CSRS based on service by the employee or Member Retiree," as used in this subpart, does not include a current spouse, former spouse, child or person with an insurable interest receiving a survivor annuity

'Self only annuity" means the recurring unreduced payments under CSRS to a retiree with no survivor annuity to anyone

'Time of retirement' means the effective commencing date for a retired employee s or Member s annuity

[50 FR 20070 May 13 1985 as amended at 51 FR 31931 Sept 8 1986]

§ 831 604 Election at time of retirement of fully reduced annuity to provide a current spouse annuity

(a) A married employee or Member retiring under CSRS will receive a fully reduced annuity to provide a current spouse annuity unless—

(1) The employee or Member, with the consent of the current spouse elects a self only annuity a partially reduced annuity, or a fully reduced annuity to provide a former spouse annuity, in accordance with § 831 605(b) or § 831 607, or

(2) The employee or Member elects a self only annuity, a partially reduced annuity or a fully reduced annuity to provide a former spouse annuity, and current spousal consent is waived in accordance with § 831 608

(b) Qualifying court orders that award former spouse annuities prevent payment of current spouse annuities to the extent necessary to comply with the court order and § 831 614

(c) The maximum rate of a current spouse annuity is 55 percent of the rate of the retiring employee s or Member's self only annuity if the employee or Member is retiring based on a separation from a position under CSRS on or after October 11, 1962 The maximum rate of a current spouse annuity is 50 percent of the rate of the retiring employee s or Member s self only annuity if the employee or Member is retiring based on a separation from a position covered under CSRS between September 30, 1956 and October 11, 1962

(d)(1) The amount of the reduction to provide a current spouse annuity equals 2½ percent of the first $3600 of the designated survivor base plus 10 percent of the portion of the designated survivor base which exceeds $3600, if—

(i) The employee's or Member's separation on which the retirement is based was on or after October 11, 1962, or

(ii) The reduction is to provide a current spouse annuity (under § 831 613) for a spouse acquired after retirement

(2) The amount of the reduction to provide a current spouse annuity under this section for former employees or Members whose retirement is based on separations before October 11 1962, equals 2½ percent of the first $2400 of the designated survivor base plus 10 percent of the portion of the designated survivor base which exceeds $2400

[50 FR 20070 May 13 1985, as amended at 51 FR 31931 Sept 8, 1986]

§ 831 605 Election at time of retirement of fully reduced annuity or partially reduced annuity to provide a former spouse annuity

(a) An unmarried employee or Member retiring under CSRS may elect a fully reduced annuity or a partially reduced annuity to provide a former spouse annuity or annuities

(b) A married employee or Member retiring under CSRS may elect a fully reduced annuity or a partially reduced annuity to provide a former spouse annuity or annuities instead of a fully reduced annuity to provide a current spouse annuity, if the current spouse consents to the election in accordance with § 831 607 or spousal consent is waived in accordance with § 831 608.

(c) An election under paragraph (a) or (b) of this section is void if it—

(1) Conflicts with a qualifying court order, or

(2) Would cause the total of current spouse annuities and former spouse annuities payable based on the employee's or Member's service to exceed 55 percent (or 50 percent if based on a separation before October 11, 1962) of the self only annuity to which the employee or Member would be entitled.

(d) Any reduction in an annuity to provide a former spouse annuity will terminate on the first day of the month after the former spouse dies or remarries before age 55, unless—

(1) The retiree elects, within 2 years after the former spouse's death or remarriage to continue the reduction to provide or increase a former spouse annuity for another former spouse, or to provide or increase a current spouse annuity, or

(2) A qualifying court order requires the retiree to provide another former spouse annuity

(e) The maximum rate of a former spouse annuity under this section or § 831 612 is 55 percent of the rate of the retiring employee's or Member's self-only annuity if the employee or Member is retiring based on a separation from a position under CSRS on or after October 11, 1962 The maximum rate of a former spouse annuity under this section or § 831 612 is 50 percent of the rate of the retiring employee's or Member's self-only annuity if the employee or Member is retiring based on a separation from a position covered under CSRS between September 30, 1956, and October 11, 1962

(f)(1) The amount of the reduction to provide a former spouse annuity equals 2½ percent of the first $3600 of the designated survivor base plus 10 percent of the portion of the designated survivor base which exceeds $3600, if—

(i) The employee's or Member's separation on which the retirement is based was on or after October 11, 1962, or

(ii) The reduction is to provide a former spouse annuity (under § 831 612) for a former spouse from whom the employee or Member was divorced after retirement

(2) The amount of the reduction to provide a former spouse annuity under this section for former employees or Members whose retirement is based on separations before October 11, 1962, equals 2½ percent of the first $2400 of the designated survivor base plus 10 percent of the portion of the designated survivor base which exceeds $2400.

[50 FR 20070, May 13, 1985 as amended at 51 FR 31931, Sept 8, 1986]

§ 831.606 Election of insurable interest annuity.

(a) At the time of retirement, an employee or Member in good health, who is applying for a non-disability annuity, may elect an insurable interest annuity Spousal consent is not required, but an election under this section does not exempt a married employee or Member from the provisions of § 831 604(a)

(b) An insurable interest annuity may be elected by an employee or Member electing a fully reduced annuity or a partially reduced annuity to provide a current spouse annuity or a former spouse annuity or annuities

(c)(1) In the case of a married employee or Member, an election under this section may not be made on behalf of a current spouse unless that current spouse has consented to an election not to provide a current spouse annuity in accordance with § 831 604(a)(1).

(2) A consent (to an election not to provide a current spouse annuity in accordance with § 831 604(a)(1)) required by paragraph (c)(1) of this section to be eligible to be the beneficiary of an insurable interest annuity is cancelled if—

(i) The retiree fails to qualify to receive the insurable interest annuity, or

30-005 O—89——8

(ii) The retiree changes his or her election to receive an insurable interest annuity under § 831 609, or

(iii) The retiree elects a fully or partially reduced annuity to provide a current spouse annuity under § 831 628

(3) An election of a partially reduced annuity under § 831 611(b) or § 831 628 to provide a current spouse annuity for a current spouse who is the beneficiary of an insurable interest annuity is void unless the spouse consents to the election

(4) If a retiree who had elected an insurable interest annuity to benefit a current spouse elects a fully reduced annuity to provide a current spouse annuity (or, with the consent of the current spouse, a partially reduced annuity to provide a current spouse annuity) under § 831 611(b) or § 831 628, the election of the insurable interest annuity is cancelled

(d) To elect an insurable interest annuity, an employee or Member must indicate the intention to make the election on the application for retirement, submit evidence to demonstrate that he or she is in good health, and arrange and pay for the medical examination that shows that he or she is in good health A report of the medical examination, signed and dated by a licensed physician must be furnished to OPM on such forms and at such time and place as OPM may prescribe through the Federal Personnel Manual system or other issuances

(e) An insurable interest annuity may be elected to provide a survivor benefit only for a person who has an insurable interest in the retiring employee or Member

(1) An insurable interest is presumed to exist with—

(i) The current spouse,

(ii) A blood or adopted relative closer than first cousins,

(iii) A former spouse,

(iv) A person to whom the employee or Member is engaged to be married,

(v) A person with whom the employee or Member is living in a relationship which would constitute a common law marriage in jurisdictions recognizing common law marriages

(2) When an insurable interest in not presumed, the employee or Member must submit affidavits from one or more persons with personal knowledge of the named beneficiary's insurable interest in the employee or Member The affidavits must set forth the relationship, if any, between the named beneficiary and the employee or Member, the extent to which the named beneficiary is dependent on the employee or Member, and the reasons why the named beneficiary might reasonably expect to derive financial benefit from the continued life of the employee or Member

(3) The employee or Member may be required to submit documentary evidence to establish the named beneficiary's date of birth

(f) After receipt of all required evidence to support an election of an insurable interest annuity, OPM will notify the employee or Member of initial monthly annuity rates with and without the election of an insurable interest annuity and the initial rate payable to the named beneficiary. No election of an insurable interest annuity is effective unless the employee or Member confirms the election in writing, dies, or becomes incompetent no later than 60 days after the date of the notice described in this paragraph

(g) (1) When an employee or Member elects both an insurable interest annuity and a fully reduced annuity or a partially reduced annuity to provide a current spouse annuity and/or a former spouse annuity or annuities, each reduction is computed based on the self only annuity computation. The combined reduction may exceed the maximum 40 percent reduction in the retired employee's or Member's annuity permitted under section 8339(k)(1) of title 5, United States Code, applicable to insurable interest annuities

(2) The rate of annuity paid to the beneficiary of an insurable interest election, when the employee or Member also elected a fully reduced annuity or a partially reduced annuity, equals 55 (or 50 percent if based on a separation before October 11, 1962) percent of the rate of annuity after the insurable interest reduction The additional reduction to provide a current spouse annuity or a former spouse annuity is not considered in determining the rate of annuity paid to the beneficiary of the insurable interest election.

(h) (1) Except as provided in § 831 605(d), if a retiree who is receiving a fully reduced annuity or a partially reduced annuity to provide a former spouse annuity has also elected an insurable interest annuity to benefit a current spouse and if the eligible former spouse dies or remarries before age 55 and no other former spouse is entitled to a survivor annuity based on an election made in accordance with § 831 612 or a qualifying court order, the retiree may elect, within 2 years after the former spouse's death or remarriage, to convert the insurable interest annuity to a fully reduced annuity to provide a current spouse annuity, effective on the first day of the month following the death or remarriage of the former spouse.

(2) An election under paragraph (h)(1) of this section cancels any consent not to receive a current spouse annuity required by paragraph (c) of this section for the current spouse to be eligible for an annuity under this section

(3) When a former spouse receiving an annuity under section 8341(h) of title 5, United States Code, loses eligibility to that annuity, a beneficiary of an insurable interest annuity who was the current spouse at both the time of the retiree's retirement and death may, within 2 years after the death or remarriage of the former spouse, elect to receive a current spouse annuity instead of the annuity he or she had been receiving.

(i) Upon the death of the current spouse, a retiree whose annuity is reduced to provide both a current spouse annuity and an insurable interest benefit for a former spouse is not permitted to convert the insurable interest annuity to a reduced annuity to provide a former spouse annuity.

(j) An employee or Member may name only one natural person as the named beneficiary of an insurable interest annuity. OPM will not accept the designation of contingent beneficiaries and such a designation is void.

(k) (1) An election under this section is prospectively voided by an election of a reduced annuity to provide a current spouse annuity under § 831 613 that would benefit the same person.

(2) (i) If the spouse is not the beneficiary of the election under this section, a retiree may prospectively void an election under this section at the time the retiree elects a reduced annuity to provide a current spouse annuity under § 831.613

(ii) A retiree's election to void an election under paragraph (k)(2)(i) of this section must be filed at the same time as the election under § 831.613.

[50 FR 20070, May 13, 1985, as amended at 51 FR 31931, Sept 8, 1986, 52 FR 10216, Mar. 31, 1987]

§ 831.607 Election of a self-only annuity or partially reduced annuity by married employees and Members.

(a) A married employee may not elect a self-only annuity or a partially reduced annuity to provide a current spouse annuity without the consent of the current spouse or a waiver of spousal consent by OPM in accordance with § 831.608.

(b) Evidence of spousal consent or a request for waiver of spousal consent must be filed on a form prescribed by OPM.

(c) The form will require that a notary public or other official authorized to administer oaths certify that the current spouse presented identification, gave consent, signed or marked the form, and acknowledged that the consent was given freely in the notary's or official's presence.

§ 831.608 Waiver of spousal consent requirement.

(a) The spousal consent requirement will be waived upon a showing that the spouse's whereabouts cannot be determined A request for waiver on this basis must be accompanied by—

(1) A judicial determination that the spouse's whereabouts cannot be determined; or

(2) (i) Affidavits by the employee or Member and two other persons, at least one of whom is not related to the employee or Member, attesting to the inability to locate the current spouse and stating the efforts made to locate the spouse; and

(ii) Documentary corroboration such as tax returns filed separately or newspaper stories about the spouse's disappearance.

(b) The spousal consent requirement will be waived if the employee or Member presents a judicial determination regarding the current spouse that would warrant waiver of the consent requirement based on exceptional circumstances.

[50 FR 20070, May 13, 1985, as amended at 51 FR 31932, Sept. 8, 1986]

§ 831.609 Changes of election before final adjudication.

An employee or Member may name a new survivor or change his election of type of annuity if, not later than 30 days after the date of the first regular monthly payment, the named survivor dies or the employee or Member files with OPM a new written election. All required evidence of spousal consent or justification for waiver of spousal consent, if applicable, must accompany any new written election under this section.

§ 831.610 Marital status at time of retirement.

An employee or Member is unmarried at the time of retirement for all purposes under this subpart only if the employee or Member was unmarried on the date that the annuity begins to accrue.

§ 831.611 Changes of election after final adjudication.

(a) Except as provided in section 8339 (j) or (k) of title 5, United States Code, or §§ 831.621, 831.623, 831.628, or paragraph (b) of this section, an employee or Member may not revoke or change the election or name another survivor later than 30 days after the date of the first regular monthly payment.

(b) (1) Except as provided in § 831.606 and paragraphs (b)(2) and (b)(3) of this section, a retiree who was married at the time of retirement and has elected a self-only annuity, or a partially reduced annuity to provide a current spouse annuity, or a fully reduced annuity or a partially reduced annuity to provide a former spouse annuity, or an insurable interest annuity may elect, no later than 18 months after the time of retirement, an annuity reduction or an increased annuity reduction to provide a current spouse annuity.

(2) A current spouse annuity based on an election under paragraph (b)(1) of this section cannot be paid if it will, when combined with any former spouse annuity or annuities that are required by court order, exceed the maximum survivor annuity permitted under § 831.614.

(3) To make an election under paragraph (b)(1) of this section, the retiree must pay, in full, a deposit determined under § 831.629, plus interest, at the rate provided under § 831.105(g), no later than 18 months after the time of retirement.

(4) If a retiree makes an election under paragraph (b)(1) of this section and is prevented from paying the deposit within the 18-month time limit because OPM did not send him or her a notice of the amount of the deposit at least 30 days before the time limit expires, the time limit for making the deposit will be extended to 30 days after OPM sends the notice of the amount of the deposit.

(5) An election under paragraph (b)(1) of this section, cancels any spousal consent under § 831.604 to the extent of the election.

(6) An election under paragraph (b)(1) of this section is void unless it is filed with OPM before the retiree dies.

(7) If a retiree who had elected a fully reduced annuity or a partially reduced annuity to provide a former spouse annuity or former spouse annuities makes an election under paragraph (b)(1) of this section which would cause the combined current spouse annuity and former spouse annuity (or annuities) to exceed the maximum allowed under § 831.614, the former spouse annuity (or annuities) must be reduced to not exceed the maximum allowable under § 831.614.

[51 FR 31932, Sept. 8, 1986]

§ 831.612 Post-retirement election of fully reduced annuity or partially reduced annuity to provide a former spouse annuity.

(a)(1) Except as provided in paragraphs (b) and (c) of this section, when the marriage of a retiree who retired on or after May 7, 1985, terminates after retirement, he or she may elect in writing a fully reduced annuity or a partially reduced annuity to provide a former spouse annuity. Such an election must be filed with OPM within 2 years after the retiree's marriage to the former spouse terminates.

(2) Except as provided in paragraphs (b) and (c) of this section, a retiree who retired before May 7, 1985, and whose marriage was terminated on or after May 7, 1985, may elect in writing a fully reduced annuity or a partially reduced annuity to provide a former spouse annuity if the retiree while married to the former spouse had elected, prior to May 7, 1985, a reduced annuity to provide a current spouse annuity for that spouse. Such an election must be filed with OPM within 2 years after the retiree's marriage to the former spouse terminates.

(3) Except as provided in paragraphs (b) and (c) of this section, a retiree who retired on or after May 7, 1985, and before February 27, 1986, and whose marriage terminated before May 7, 1985, may elect in writing a fully reduced annuity or a partially reduced annuity to provide a former spouse annuity. Such an election must be made no later than February 27, 1988.

(b) An election under paragraph (a) of this section will not be permitted—

(1) If it conflicts with a qualifying court order; or

(2) If it would cause the combined current and former spouse annuities to exceed 55 percent of the retiree's annuity; or

(3) In the case of a married retiree, if the current spouse does not consent to the election on the form described in § 831.607(c) and spousal consent is not waived by OPM in accordance with § 831.608; or

(4) To the extent that it provides a former spouse annuity for the spouse who was married to the retiree at the time of retirement in an amount that is inconsistent with any joint designation or waiver made at the time of retirement under § 831.604 (a)(1) or (a)(2).

(c) An election under this section is not permitted unless the retiree agrees to deposit the amount equal to the difference between the amount of annuity actually paid to the retiree and the amount of annuity that would have been paid if the reduction elected under paragraph (a) of this section had been in effect continuously since the time of retirement, plus 6 percent annual interest, computed under § 831.105, from the date when each difference occurred.

(d) The annuity reduction under this section terminates under the conditions stated in § 831.605(d).

[50 FR 20070, May 13, 1985, as amended at 51 FR 31932, Sept. 8, 1986; 52 FR 3209, Feb. 3, 1987]

§ 831.613 Post-retirement election of fully reduced annuity or partially reduced annuity to provide a current spouse annuity.

(a) In cases of retirees who retired before May 7, 1985, and married after retirement but before February 27, 1986:

(1) A retiree who was unmarried at the time of retirement may elect, within 1 year after a post-retirement marriage, a fully reduced annuity or a partially reduced annuity to provide a current spouse annuity.

(2) A retiree who was married and elected a fully reduced annuity or a partially reduced annuity at the time of retirement may elect, within 1 year after a post-retirement marriage, to provide a current spouse annuity.

(3) The reduction under paragraph (a)(1) or (a)(2) of this section commences on the first day of the month beginning 1 year after the date of the post-retirement marriage.

(b) In cases involving retirees who retired on or after May 7, 1985, or married on or after February 27, 1986:

(1) Except as provided in paragraph (b)(3) of this section, a retiree who was unmarried at the time of retirement may elect, within 2 years after a post-retirement marriage, a fully reduced

annuity or a partially reduced annuity to provide a current spouse annuity

(2) Except as provided in paragraph (b)(3) of this section a retiree who was married at the time of retirement may elect, within 2 years after a post retirement marriage a fully reduced annuity or a partially reduced annuity to provide a current spouse annuity if

(i) The retiree was awarded a fully reduced annuity under § 831.604 at the time of retirement, or

(ii) The election at the time of retirement was made with a waiver of spousal consent in accordance with § 831.608, or

(iii) The marriage at the time of retirement was to a person other than the spouse who would receive a current spouse annuity based on the post retirement election

(3) An election under paragraph (b)(1) or (b)(2) of this section is not effective to the extent that it conflicts with a qualifying court order or would cause the combined current and former spouse annuities to exceed 55 percent (or 50 percent if based on a separation before October 11, 1962) of the retiree's annuity

(4) (i) Except as provided in paragraph (b)(4)(ii) of this section, a retiree making an election under this section must deposit an amount equal to the difference between the amount of annuity actually paid to the retiree and the amount of annuity that would have been paid if the reduction elected under paragraph (b)(1) or (b)(2) of this section had been in effect continuously since the time of retirement, plus 6 percent annual interest, computed under § 831.105, from the date when each difference occurred

(ii) An election under this section may be made without deposit if that election prospectively voids an election of an insurable interest annuity

(5) Any reduction in an annuity to provide a current spouse annuity will terminate effective on the first day of the month after the marriage to the current spouse ends, unless—

(i) The retiree elects, within 2 years after a divorce terminates the marriage, to continue the reduction to provide for a former spouse annuity, or

(ii) A qualifying court order requires the retiree to provide a former spouse annuity

[50 FR 20070 May 13 1985 as amended at 51 FR 31933 Sept 8 1986]

§ 831.614 Division of a survivor annuity

(a) Except as provided in §§ 831.621 and 831.622, the maximum combined total of all current and former spouse annuities (not including any benefits based on an election of an insurable interest annuity) payable based on the service of a former employee or Member equals 55 percent (or 50 per cent if based on a separation before October 11 1962) of the rate of the self only annuity that otherwise would have been paid to the employee, Member, or retiree

(b) By using the elections available under this subpart or to comply with a court order under Subpart Q, a survivor annuity may be divided into a combination of former spouse annuities and a current spouse annuity so long as the aggregate total of current and former spouse annuities does not exceed the maximum limitation in paragraph (a) of this section

(c) Upon termination of former spouse annuity payments because of death or remarriage of the former spouse, or by operation of a court order, the current spouse will be entitled to a current spouse annuity or an increased current spouse annuity if—

(1) The employee or Member died while employed in a position covered under CSRS, or

(2) The current spouse was married to the employee or Member continuously from the time of retirement and did not consent to an election not to provide a current spouse annuity, or

(3) The current spouse married a retiree after retirement and the retiree elected under § 831.613, to provide a current spouse annuity for that spouse in the event that the former spouse annuity payments terminate

[50 FR 20070 May 13 1985, as amended at 51 FR 31933 Sept 8 1986]

§ 831.615 Child's annuity during school attendance

For a child to be eligible for continuation of annuity beyond age 18 because of student status, the child, in addition to meeting all other requirements applicable to a child survivor who has not attained age 18, must present a certificate on a form prescribed by OPM from the educational or training institution that certifies that the child is regularly pursuing a full time day or evening course of resident study or training For this purpose, a full time course of resident study or training means a day or evening noncorrespondence course that contemplates school attendance at the rate of at least 30 weeks per academic year with a subject load sufficient, if successfully completed, to attain the educational or training objective within the period generally accepted as minimum for completion, by a full time day student, of the academic or training program concerned.

§ 831.616 Proof of dependency.

(a) To be eligible for survivor annuity benefits, a child must have been dependent on the employee, Member, or retiree at the time of the employee's, Member's, or retiree's death.

(b) A child is considered to have been dependent on the deceased employee, Member, or retiree if he or she is—

(1) A legitimate child; or

(2) An adopted child, or

(3) A child who lived with, and for whom a petition of adoption was filed by, the employee, Member, or retiree, and who was adopted by the surviving spouse of the employee, Member, or retiree after the employee's, Member's, or retiree's death, or

(4) A stepchild or recognized natural child who lived with the employee, Member, or retiree in a regular parent-child relationship at the time of the employee's, Member's, or retiree's death, or

(5) A recognized natural child for whom a judicial determination of support was obtained, or

(6) A recognized natural child to whose support the employee, Member, or retiree made regular and substantial contributions

(c) The following are examples of proofs of regular and substantial support. More than one of the following proofs may be required to show support of a natural child who did not live with the employee, Member, or retiree in a regular parent child relationship and for whom a judicial determination of support was not obtained.

(1) Evidence of eligibility as a dependent child for benefits under other State or Federal programs, and

(2) Proof of inclusion of the child as a dependent on the decedent's income tax returns for the years immediately before the employee's, Member's, or retiree's death, and

(3) Cancelled checks, money orders, or receipts for periodic payments received from the employee, Member, or retiree for or on behalf of the child; and

(4) Evidence of goods or services that show regular contributions of considerable value, and

(5) Proof of coverage of the child as a family member under the employee's Member's, or retiree's Federal Employees Health Benefits enrollment; and

(6) Other proof of a similar nature that OPM may find to be sufficient to demonstrate support or parentage.

(d) Survivor benefits may be denied—

(1) If evidence shows that the deceased employee, Member, or retiree did not recognize the claimant as his or her own despite a willingness to support the child, or

(2) If evidence casts doubt upon the parentage of the claimant, despite the deceased employee's, Member's, or retiree's recognition and support of the child.

§ 831.617 Rates of child annuities.

(a) (1) The rate of annuity payable to a child survivor whose annuity commenced before February 27, 1986, is computed in accordance with the law in effect on the date when the annuity began to accrue, unless the rate of annuity is recomputed under paragraph (e) of this section on or after February 27, 1986

(2) The rate of annuity payable to a child survivor whose annuity commenced on or after February 27, 1986, or was recomputed under paragraph (e) of this section on or after February

27, 1986, is computed under paragraph (b), (c), or (d) of this section.

(b) Except as provided in paragraph (a) of this section, the rate of annuity of a child survivor is computed under section 8341(e)(2) (i) through (iii) of title 5, United States Code, with adjustments in accordance with section 8340 of title 5, United States Code, when the deceased employee, Member or annuitant was never married to a natural or adoptive parent of that surviving child of the former employee or Member.

(c) Except as provided in paragraphs (a) and (b) of this section, the rate of annuity payable to a child survivor is computed under section 8341(e)(2) (A) through (C) of title 5, United States Code, with adjustments in accordance with section 8340 of title 5, United States Code, whenever a deceased employee, Member, or retiree is survived by a natural or adoptive parent of that surviving child of the employee, Member, or retiree.

(d) Except as provided in paragraph (a) of this section, the rate of annuity payable to a child survivor is computed under section 8341(e)(2) (i) through (iii) of title 5, United States Code, with adjustments in accordance with section 8340 of title 5, United States Code, when the deceased employee, Member, or retiree is not survived by a natural or adoptive parent of that surviving child of the former employee or Member.

(e) On the death of a natural or adoptive parent or termination of the annuity of a child, the annuity of any other child or children is recomputed and paid as though the parent or child had not survived the former employee or Member.

[51 FR 31933, Sept. 8, 1986]

§ 831.618 Marriage duration requirements.

(a) The surviving spouse of a retiree who retired on or after May 7, 1985, or of a retiree who retired before May 7, 1985, but married that surviving spouse on or after November 8, 1984, or of an employee or Member who dies while serving in a position covered by CSRS on or after May 7, 1985, or of an employee or Member who died while serving in a position covered by CSRS before May 7, 1985, but married that surviving spouse on or after November 8, 1984, can qualify for a current spouse annuity only if—

(1) The surviving spouse and the employee, Member, or retiree had been married for at least 9 months, as explained in paragraph (b) of this section, or

(2) A child was born of the marriage, as explained in paragraph (c) of this section; or

(3) The death of the employee, Member, or retiree was accidental as explained in paragraph (d) of this section.

(b) For satisfying the 9-month marriage requirement of paragraph (a)(1) of this section, the aggregate time of all marriages between the spouse applying for a current spouse annuity and the employee, Member, or retiree is included.

(c) For satisfying the child-born-of-the-marriage requirement of paragraph (a)(2) of this section, any child, including a posthumous child, born to the spouse and the employee, Member, or retiree is included. This includes a child born out of wedlock or of a prior marriage between the same parties.

(d)(1) A death is accidental if it results from homicide or from bodily injuries incurred solely through violent, external, and accidental means. The term "accidental" does not include a death—

(i) Caused wholly or partially, directly or indirectly, by disease or bodily or mental infirmity, or by medical or surgical treatment or diagnosis thereof; or

(ii) Caused wholly or partially, directly, or indirectly, by ptomaine, by bacterial infection, except only septic infection of and through a visible wound sustained solely through violent, external, and accidental means; or

(iii) Caused wholly or partially, directly or indirectly, by hernia, no matter how or when sustained; or

(iv) Caused by or the result of intentional self-destruction or intentionally self-inflicted injury, while sane or insane.

(2) A State judicial or administrative adjudication of the cause of death for criminal or insurance purposes is conclusive evidence of whether a death is accidental.

(3) A death certificate showing the cause of death as accident or homicide is *prima facie* evidence that the death was accidental.

[50 FR 20070, May 13, 1985; 50 FR 21031, May 22, 1985, as amended at 51 FR 31933, Sept. 8, 1986]

§ 831.619 Time for filing applications for death benefits.

(a) A survivor of a deceased employee, Member, or retiree, may file an application for annuity, personally or through a representative, at any time within 30 years after the death of the employee, Member, or retiree.

(b) A former spouse claimng eligibility for an annuity based on § 831.622 may file an application at any time between November 8, 1984 and May 9, 1987. Within this period, the date that the first correspondence indicating a desire to file a claim is received by OPM will be treated as the application date for meeting timeliness deadlines and determining the commencing date of the survivor annuity under § 831.622 if the former spouse is eligible on that date.

§ 831.620 Commencing and terminating dates of survivor annuities.

(a) A survivor annuity payable from the Civil Service Retirement and Disability Fund commences the day after (1) death of the employee, Member, or retiree; or (2) attainment of age 50 when, under section 12 of the Civil Service Retirement Act Amendments of February 29, 1948, the annuity is deferred until age 50; or (3) a claim is received in OPM when an annuity is authorized for unremarried widows and widowers by section 2 of the Civil Service Retirement Act Amendments of June 25, 1958, 72 Stat. 218; or (4) the later of the date of death of the retiree or the first day of the second month after the date the application for annuity is filed under § 831.622; or (5) the later of the date of death of the employee, Member, or retiree or the first day of the second month after the court order awarding the former spouse annuity is received in OPM when a former spouse annuity is authorized by court order under section 8341(h) of title 5, United States Code.

(b) A survivor annuity terminates at the end of the month preceding death or any other terminating event.

(c) A current spouse annuity terminated for reasons other than death may be restored under conditions defined in sections 8341(e)(2) and 8341(g) of title 5, United States Code.

(d) A survivor annuity accrues on a daily basis, one-thirtieth of the monthly rate constituting the daily rate. An annuity does not accrue for the 31st day of any month, except in the initial month if the survivor's (of a deceased employee) annuity commences on the 31st day. For accrual purposes, the last day of a 28-day month constitutes 3 days and the last day of a 29-day month constitutes 2 days.

(e) Initial cost-of-living increases on current and former spouse annuities, and annuities to beneficiaries of insurable interest annuities are prorated under section 8340(c) of title 5, United States Code.

[50 FR 20070, May 13, 1985, as amended at 51 FR 31933, Sept. 8, 1986]

§ 831.621 Election by a retiree who retired before May 7, 1985, to provide a former spouse annuity.

(a) A retiree who retired before May 7, 1985, including a retiree receiving a fully reduced annuity to provide a current spouse annuity, may elect a fully reduced annuity or a partially reduced annuity to provide a former spouse annuity.

(b) The election should be made by letter addressed to OPM. The election must—

(1) Be in writing; and

(2) Agree to pay any deposit due under paragraph (d) of this section; and

(3) Be signed by the retiree; and

(4) Be filed with OPM before September 8, 1987.

(c)(1)(i) If a retiree who is receiving an insurable interest annuity elects a fully reduced annuity or a partially reduced annuity under this section to benefit the same person, the insurable interest annuity terminates. A retiree who is receiving an insurable interest

annuity at the time that an annuity is elected under this section does not owe any further deposit

(ii) If a retiree who had been receiving an insurable interest annuity which was terminated to elect a reduced annuity to provide a current spouse annuity for a spouse acquired after retirement, elects to provide a former spouse annuity for a former spouse who was the beneficiary of the insurable interest annuity, the retiree must deposit an amount equal to the sum of the monthly differences between the self only annuity and a fully reduced annuity or partially reduced annuity (with the same base as elected to provide the former spouse annuity) from the date the insurable interest annuity terminated, plus 6 percent annual interest, computed under § 831 105, from the date to which each monthly difference is attributable

(2) A retiree who elects a fully reduced annuity or a partialy reduced annuity under this section, to provide a former spouse annuity for a former spouse for whom the retiree had elected *(during the marriage to that former* spouse) a reduced annuity to provide a current spouse annuity, must deposit an amount equal to the sum of the monthly differences between the self only annuity and the amount of annuity that would have been in effect had a fully reduced annuity or partially reduced annuity (with the same base as elected to provide the former spouse annuity) been in effect continuously since the time of retirement, plus 6 percent annual interest, computed under § 831 105, from the date to which each monthly difference is attributable, except that the retiree will not be charged for any period during which the survivor reduction was in effect for that former spouse

(3) A retiree who elects a fully reduced annuity or a partially reduced annuity under this section, and is not covered under paragraph (c)(1) or (c)(2) of this section, must deposit an amount equal to the sum of the monthly difference between the self only annuity and a fully reduced annuity or a partialy reduced annuity (with the same base as elected to provide the former spouse annuity) since the time of retirement, plus 6 percent annual interest computed under § 831 105 from the date to which each monthly difference is attributable

(d) If a retiree who is receiving a fully reduced annuity or a partially reduced annuity to provide a current spouse annuity elects a fully reduced annuity or a partially reduced annuity under this section to provide a former spouse annuity, the annuity will be reduced separately to provide for the current and former spouse annuities Each separate reduction will be computed based on the self-only annuity, and the separate reductions are cumulative

(e)(1) In response to a retiree's inquiry about providing a former spouse annuity under this section, OPM will send an application form The application form will include a notice to retirees that filing the application constitutes an official election which cannot be revoked after 30 days after the annuity check in which the annuity reduction first appears

(2) If the retiree returns the application electing a fully reduced annuity or a partially reduced annuity under this section, OPM will notify the retiree of—

(i) The rate of the fully reduced annuity or partially reduced annuity, and

(ii) The rate of the potential former spouse annuity and

(iii) The amount of the deposit, including interest, that is due as of the date that the annuity reduction is scheduled to begin, and

(iv) The amount and duration of installment payments if no deposit is made

(3) The notice under paragraph (e)(2) of this section will advise the retiree that the deposit will be collected in installments under § 831 624, unless lump sum payment is made within 60 days from the date of the notice

(4) OPM will reduce the annuity and begin collection of the deposit in installments effective with the first check payable more than 60 days after the date on the notice required under paragraph (e)(2) of this section

(f)(1) A retiree who made an election under this section prior to September 9, 1986 may modify that election by designating a lesser portion of the retiree's annuity be used as the base for the annuity reduction and the former spouse annuity

(2) Any modification under paragraph (f)(1) of this section must be in writing and received in OPM no later than the date provided for applications in § 831 621(b)(4)

[50 FR 20070, May 13, 1985, as amended at 51 FR 31934, Sept 8, 1986]

§ 831 622 Annuities for former spouses of employees or Members retired before May 7, 1985.

(a)(1) The former spouse of a retiree who retired before May 7, 1985 (or of an employee or Member who died before May 7, 1985, was employed in a position covered by CSRS at the time of death, and had fulfilled the age and service requirements to be eligible to retire under section 8336 of title 5 United States Code, at the time of death) is entitled, after the death of the retiree, employee, or Member to a survivor annuity equal to 55 percent of the annuity of the retiree on whose service the survivor annuity is based if the former spouse, at the time of application, meets all of the following requirements

(i) The former spouse's marriage to the retiree, employee, or Member was dissolved after September 14, 1978. The date of dissolution of a marriage is the date when the marriage between the former spouse and the retiree, employee, or Member ended under the law of the jurisdiction that terminated the marriage, rather than the date when restrictions on remarriage ended The date of entry of the decree terminating the marriage will be rebuttably presumed to be the date when the marriage was dissolved.

(ii) The former spouse was married to the retiree, employee, or Member for at least 10 years of the retiree's, employee's, or Member's creditable service Creditability of service is determined in accordance with section 8332 of title 5, United States Code, and Subpart C of this part

(iii) The former spouse has not remarried before reaching age 55

(iv) The former spouse applies to OPM for a survivor annuity, in accordance with paragraph (b) of this section and § 831 619(b), before May 9, 1987.

(v) The former spouse is at least 50 years old when filing the application

(2) A former spouse who is not eligible for an annuity under paragraph (a)(1) of this section and who is the former spouse of a retiree who retired before May 7, 1985 (or of an employee or Member who died before May 7, 1985, was employed in a position covered by CSRS at the time of death, and had fulfilled the age and service requirements to be eligible to retire under section 8336 of title 5, United States Code, at the time of death) is entitled, after the death of the retiree, employee, or Member to a survivor annuity equal to 55 percent of the annuity of the retiree on whose service the survivor annuity is based if the former spouse at the time of application, meets all of the following requirements

(i) The former spouse was married to the retiree, employee, or Member for at least 10 years of the retiree's, employee's, or Member's creditable service. Creditability of service is determined in accordance with section 8332 of title 5, United States Code, and Subpart C of this part

(ii) The former spouse has not remarried before reaching age 55

(iii) The former spouse applies to OPM for a survivor annuity, in accordance with paragraph (b) of this section and § 831 619(b), before May 9, 1987.

(iv) The former spouse is at least 50 years old when filing the application

(v) No current spouse, other former spouse, or insurable interest designee is receiving or has been designated to receive a survivor annuity based on the service of the employee, Member, or retiree

(3) If two or more eligible former spouses of a retiree, employee, or Member apply for annuities under paragraph (a)(2) of this section based on the service of the same retiree, employee, or Member, and neither meets the requirements of paragraph (a)(1) of this section, the former spouse whose application OPM receives first is entitled to the annuity

(b) (1) Application must be filed on the form prescribed for that purpose by OPM. The application form will require the former spouse to certify under the penalty provided by section

1001 of title 18, United States Code, that he or she meets the requirements listed in paragraph (a) of this section

(2) In addition to the application form required in paragraph (b)(1) of this section, the former spouse must submit proof of his or her age and the date when the marriage to the retiree commenced, and a certified copy of the divorce decree terminating the marriage to the retiree

(3)(i) Former spouses applying for benefits under this section must meet the requirements of paragraph (a) of this section at the time of application

(ii) An annuity under this section terminates on the last day of the month before the former spouse dies or remarries before age 55 A former spouse who is receiving a former spouse annuity under this section must notify OPM within 30 days after he or she remarries before age 55

(c) Survivor annuities payable under this section commence on the later of the day after the date of death of the retiree or the first day of the second month after the application is filed under § 831.619(b).

(d) Cost of living adjustments under section 8340 of title 5, United States Code, are applicable to annuities payable under this section.

[50 FR 20070, May 13, 1985, as amended at 51 FR 31933, Sept 8, 1986]

§ 831.623 Second chance elections to provide survivor benefits.

(a) A married retiree who retired before May 7, 1985, and is not currently receiving a fully or partially reduced annuity to provide a current spouse annuity may elect a fully or partially reduced annuity to provide a current spouse annuity for a spouse acquired after retirement if the following conditions are met

(1) (i) The retiree was married at the time of retirement and did not elect a survivor annuity at that time, or

(ii) The retiree failed to elect a fully or partially reduced annuity within 1 year after a post-retirement marriage that occurred before November 8, 1984, and the retiree attempted to elect a fully or partially reduced annuity after the time limit expired and that request was disallowed as untimely

(2) The retiree applies for a fully or partially reduced annuity under this section before November 9, 1985.

(3) The retiree agrees to pay the amount due under paragraph (d) of this section

(b) Applications must be filed on the form prescribed by OPM, except filing the form is excused when the retiree dies before filing the required form if

(1) The retiree made a written request, after November 8, 1984, to elect a fully or partially reduced annuity under this section, and

(2) The retiree was denied the opportunity to file the required form because the retiree, without fault, did not receive the form in sufficient time for the retiree to be reasonably expected to complete the form before death.

(c) (1) In response to a retiree's inquiry about providing a current spouse annuity under this section, OPM will send an application form. This application will include instructions to assist the retiree in estimating the amount of reduction in the annuity to provide the current spouse annuity and the amount of the required deposit The application form will include a notice to retirees that filing the application constitutes an official election which cannot be revoked after 30 days after the annuity check in which the annuity reduction first appears.

(2) If the retiree returns the application electing a fully or partially reduced annuity under this section, OPM will notify the retiree of—

(i) The rate of the fully reduced annuity, and

(ii) The rate of the potential current spouse annuity; and

(iii) The amount of the deposit, including interest, that is due as of the date that the annuity reduction is scheduled to begin; and

(iv) The amount and duration of installment payments if no deposit is made.

(3) The notice under paragraph (c)(2) of this section will advise the retiree that the deposit will be collected in installments under § 831.624, unless lump-sum payment is made within 60 days from the date of this notice.

(4) OPM will reduce the annuity and begin collection of the deposit in installments effective with the first check payable more than 60 days after the date on the notice required under paragraph (c)(2) of this section.

(d) The retiree must state on the application form whether the application is made under paragraph (a)(1)(i) of this section or paragraph (a)(1)(ii) of this section If the application is made under paragraph (a)(1)(ii) of this section, the retiree must prove that he or she had attempted to elect a fully reduced annuity and that OPM rejected that application because it was filed too late. The proof must consist of a copy of OPM's letter rejecting the previous election as untimely filed or an affidavit swearing or affirming that he or she made an untimely application which OPM rejected. The affidavit is sufficient documentation to provide proof of the retiree's attempt to elect a reduced annuity, unless the record contains convincing evidence to rebut the certification.

(e) A retiree who elects to provide a current spouse annuity under this section must agree to pay a deposit equal to the difference between the amount of annuity actually paid to the retiree and the amount of annuity that would have been paid if a fully reduced annuity were being paid continuously since the time of retirement, plus 6 percent annual interest, computed under § 831.105, from the date when each difference occurred.

(f) The rate of a survivor annuity under this section will be computed under the laws in effect at the time of the retiree's separation from the Federal service.

[50 FR 20070, May 13, 1985, as amended at 51 FR 31935, Sept 8, 1986]

§ 831.624 Payments of required deposits.

(a) The deposits required to elect fully or partially reduced annuities under §§ 831.611, 831.612, 831.613, 831.621, 831.623, or 831.628 are not annuity overpayments and their collection is not subject to waiver. They are subject to reconsideration only to determine whether the amount has been correctly computed.

(b) If a retiree fails to make a deposit required under § 831.621 or § 831.623 within 60 days after the date of the notice required by § 831.621(e) or § 831.623(c), the deposit will be collected by offset from his or her annuity in installments equal to 25 percent of the retiree's net annuity (as defined in § 831.1703).

(c) If a retiree fails to make a deposit required by §§ 831.612 or 831.613 within 2 years after the date of the post-retirement marriage or divorce, the deposit will be collected by offset from his or her annuity in installments equal to 25 percent of the retiree's net annuity (as defined in § 831.1703).

(d) If a retiree dies before a deposit required under §§ 831.612, 831.613, 831.621, or 831.623 is fully made, the deposit will be collected from the survivor annuity (for which the election required the deposit) before any payments of the survivor annuity are made.

(e) The deposits required by § 831.611 or § 831.628 are controlled by § 831.629.

[50 FR 20070, May 13, 1985, as amended at 51 FR 31935, Sept. 8, 1986]

§ 831.625 Remarriage.

(a)(1) If a recipient of a current spouse annuity remarried before November 8, 1984, the current spouse annuity terminates on the last day of the month before the recipient remarried before attaining age 60.

(2) If a recipient of a current spouse annuity remarries on or after November 8, 1984, a current spouse annuity terminates on the last day of the month before the recipient remarries before attaining age 55.

(b) A former spouse annuity or eligibility for a future former spouse annuity terminates on the last day of the month before the month in which the former spouse remarries before attaining age 55.

(c) If a current spouse annuity is terminated because of remarriage of the recipient, the annuity is reinstated on the day of the termination of the remarriage by death, annulment, or divorce if—

(1) The surviving spouse elects to receive this annuity instead of a survivor benefit to which he or she may be entitled, under CSRS or another retire-

ment system for Government employees, by reason of the remarriage, and

(2) Any lump sum paid on termination of the annuity is repaid (in a single payment or by withholding payment of the annuity until the amount of the lump sum has accrued).

(d) If present or future entitlement to a former spouse annuity is terminated because of remarriage of the recipient or potential recipient, the entitlement is permanently extinguished. An annulment of the remarriage does not reinstate the entitlement.

[50 FR 20070, May 13, 1985, as amended at 51 FR 31935, Sept 8, 1986]

§ 831.626 Elections by previously retired retiree with new title to an annuity.

(a) A reemployed retiree (after 5 or more years of reemployed annuitant service) who elects a redetermined annuity under section 8344 of title 5, United States Code, is subject to §§ 831.604 through 831.611 at the time of the redetermination.

(b) A disability retiree who recovers from disability or is restored to earning capacity is subject to §§ 831.604 through 611 at the time that he or she retires under section 8336 or 8338 of title 5, United States Code.

(c) A retiree who is dropped from the retirement rolls and subseqently gains a new annuity right by fulfilling the requirements of section 8333(b) of title 5, United States Code, is subject to §§ 831.604 through 831.611 when he or she retires under that new annuity right.

§ 831.627 Annual notice required by Pub. L. 95-317.

At least once every 12 consecutive months, OPM will send a notice to all retirees to inform them about the survivor annuity elections available to them, under sections 8339(j) and 8339(k)(2) of title 5, United States Code. In the event of post-retirement marriages.

§ 831.628 Changes in elections to provide a current spouse annuity by a retiree who retired before May 28, 1986

(a) Except as provided in § 831.606 and paragraphs (b) and (c) of this section, a retiree who retired before May 28, 1986, was married at the time of retirement, and at the time of retirement did not elect a fully reduced annuity to provide a current spouse annuity may elect a fully reduced annuity or a greater partially reduced annuity to provide a current spouse annuity

(b)(1) An election under paragraph (a) of this section may be made only by a retiree who is married to the same spouse to whom the retiree was married at the time of retirement.

(2) A current spouse annuity based on an election under paragraph (a) of this section cannot be paid if it will, when combined with any former spouse annuity or annuities that are required by court order, exceed the maximum survivor annuity permitted under § 831 614.

(3)(i) Except as provided in paragraph (b)(4) of this section, to make an election under paragraph (a) of this section, the retiree must pay the deposit computed under § 831.629, in full, no later than November 28, 1987.

(ii) Except as provided in paragraph (b)(4) of this section, failure to pay the deposit, in full, before November 29, 1987, voids an election made under paragraph (a) of this section.

(4) If a retiree makes an election under paragraph (a) of this section and is prevented from paying the deposit within the 18-month time limit because OPM did not send him or her a notice of the amount of the deposit at least 30 days before the time limit expires, the time limit for making the deposit will be extended to 30 days after OPM sends the notice of the amount of the deposit.

(c) If a retiree who had elected a fully reduced annuity or a partially reduced annuity to provide a former spouse annuity makes an election under paragraph (a) of this section that would cause the combined current spouse annuity and former spouse annuity (or annuities) to exceed the maximum allowed under § 831.614, the former spouse annuity (or annuities) must be reduced to conform with that allowed under § 831.614.

(d) An election under paragraph (a) of this section is void unless it is filed with OPM before the retiree dies.

[51 FR 31935, Sept 8, 1986]

§ 831.629 Deposit required to make an election under § 831.611(b) or § 831.628.

The amount of the deposit required under § 831.611(b) or § 831.628 equals the sum of the monthly differences between the annuity paid to the retiree and the annuity that would have been paid if the additional annuity reduction elected under § 831.611(b) or § 831.628 had been in effect since the time of retirement, plus 24.5 percent of the increase in the designated base (computed as of the time of retirement) on which the survivor annuity is calculated.

[51 FR 31935, Sept. 8, 1986]

Subpart G—Computation of Annuities

AUTHORITY: 5 U.S.C. 8347.

§ 831.701 Effective dates of annuities.

(a) Except as provided in paragraphs (b) and (c) of this section, an annuity of an employee or Member commences on the first day of the month after—

(1) Separation from the service; or

(2) Pay ceases and the service and age requirements for title to annuity are met, if earlier than the date of separation.

(b) An annuity of—

(1) An employee involuntarily separated from service (except by removal for cause on charges of misconduct or delinquency) and eligible for an immediate annuity based on that involuntary separation;

(2) An employee or Member retiring due to a disability; and

(3) An employee or Member retiring after serving three days or less in the month of retirement—shall commence on the day after separation from the service or the day after pay ceases and the service and age or disability requirements for title to annuity are met.

(c) An annuity granted under section 8338, title 5, United States Code, commences on the appropriate birthday of the employee or Member.

(d) Survivor annuities commence as provided in § 831.620.

(e) Except as provided in §831.502, annuity terminates on the date of death or on the date of any other terminating event in each case when OPM terminates the annuity.

(f) Annuity accrues on a daily basis, one-thirtieth of the monthly rate constituting the daily rate. Annuity does not accrue for the thirty-first day of any month, except in the initial month if the employee's annuity commences on the 31st of a 31-day month. For accrual purposes, the last day of a 28-day month constitutes 3 days and the last day of a 29-day month constitutes 2 days.

[48 FR 38786, Aug. 26, 1983, as amended at 51 FR 31936, Sept. 8, 1986]

§ 831.702 Adjustment of annuities.

(a)(1) An annuity which includes creditable National Guard technician service performed prior to January 1, 1969, shall be reduced by the portion of any benefits under any State retirement system to which an annuitant is entitled (or on proper application would be entitled) for any month in which the annuitant is eligible for State benefits based on the same pre-1969, service.

(2) Any cost-of-living increases in the State benefit shall require a corresponding deduction in the civil service annuity.

(3) Any cost-of-living increase to a civil service annuity shall apply to the gross annuity before deduction for benefits under any State retirement system.

(b) In the adjudication of claims arising under subchapter III of Chapter 83 of title 5, United States Code, OPM shall take appropriate action to obtain the data that it considers necessary to assure the proper annuity deduction. Upon request by OPM, an annuitant shall promptly submit this data.

[48 FR 38786, Aug. 26, 1983]

§ 831.703 Computation of annuities for part-time service.

(a) *Purpose.* The computational method in this section shall be used to determine the annuity for an employee who has part-time service on or after April 7, 1986.

(b) *Definitions.* In this section—

"Full-time service" means any actual service in which the employee is

Stephen L. Henriod (1469)
HENRIOD & HENRIOD
Attorney for Defendant
700 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
Telephone: (801) 321-7800

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

DAVID CLARK ADELMAN, Plaintiff vs. MARY ANNE ADELMAN a/k/a MARY ANNE LYNCH Defendant	)	ORDER Civil No.: D82-2940 Judge: Richard H. Moffat

The Court having before it pursuant to the provisions of Rule 4-501 of the Utah Code of Judicial Administration, the Commissioner's recommendation of September 14, 1989, Plaintiff's objection to said recommendation (September 28, 1989), Defendant's response to the Plaintiff's objection (October 30, 1989), the Court's prior ruling on said objection, the Plaintiff's 60(b) Motion to Strike Order and Require the Return of All Monies Taken by the Defendant (December 20, 1989), the Defendant's response to said motion (December 20, 1989), the Court's prior ruling on said motion and the Defendant's objection to decision and motion for

reconsideration. The court having read each and every document filed herein, since the Commissioner's recommendation of September 14, 1989, hereby ruling only the merits of the matter and not on any procedural or technical objections, now makes the following Order:

The Order dated and entered November 3, 1989, as prepared by counsel for the Defendant is hereby reinstated. All subsequent objections to said order and motions to set aside or otherwise modify said order are denied. Likewise, Plaintiff's motion to require the return of all monies taken by the Defendant is denied. Attached hereto marked Exhibit A is a copy of said Order.

DATED this 29 day of March, 1990.

BY THE COURT:

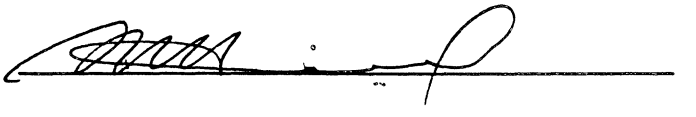
District Court Judge

00423

MAILING CERTIFICATE

I hereby certify that the foregoing Order was mailed first class, postage prepaid on the 21 day of March, 1990, to:

Richard B. Johnson
Attorney for Plaintiff
1327 South 800 East
Suite 300
Orem, Utah 84058



3

EXHIBIT A

Stephen L. Henriod (1469)
HENRIOD & HENRIOD
700-38 Eagle Gate Tower
60 East South Temple Street
Salt Lake City, Utah 84111
Telephone No.: (801)321-7800

JUDGEMENT

NOV 3 1989

Attorney for Defendant

IN THE THIRD JUDICIAL DISTRICT OF SALT LAKE COUNTY

STATE OF UTAH

2152017

DAVID CLARK ADELMAN, Plaintiff, vs. MARY ANNE ADELMAN, aka MARY ANNE LYNCH, Defendant.	11-8-89-800 am. ORDER Civil No. 824902940 Judge Richard H. Moffat

Defendant's Order to Show Cause having been argued before the honorable Michael G. Allphin, Commissioner, on the 7th day of September, 1989, when both parties were present and represented by Stephen L. Henriod for Defendant, and Richard B. Johnson for Plaintiff, the Commissioner having reviewed the file and on September 14, 1989 having made recommendations, and the time for objection, specified in Rule 6-401(2)(E) having elapsed when no objection was filed on or before September 25, 1989, it is hereby Ordered:

1. That the Plaintiff shall, on or before October 1, 1989, assign to the Defendant one-half of his FDIC retirement benefits based upon the thirteen (13) year period referred to in the decree. The amount of the benefit shall be calculated by using the number

thirteen (13) as the numerator over the total number of years the Plaintiff works as the denominator, times the benefit, divided by two (2).

The Defendant shall be designated as an "alternate payee" for that portion of Plaintiff's benefits to which she is entitled, and her benefits shall commence when the Plaintiff begins receiving benefits under the plan. Because this interest was a specific property award to the Defendant in the decree, the Plaintiff shall also name the Defendant as the beneficiary of any survivorship benefit which may be payable upon his death. The amount of the survivorship benefit shall be calculated by using the same formula of thirteen (13) as the numerator, divided by the number of years worked by Plaintiff, times the benefit. The Plaintiff shall execute the above mentioned assignments and file the original with his employer, the FDIC, and send a copy to Defendant on or before October 1, 1989.

2. That the Defendant is awarded a judgment in the amount of $5,000, plus interest at 10% per annum from the date each alimony payment became due and payable ($166 per month for 30 months commencing November 8, 1984).

3. That the Defendant be awarded a judgment in the amount of $2,734.42, which is one-half of the unreimbursed medical and dental expenses of the minor children since 1982, plus interest at 10% per annum from the date each bill was paid. (See Exhibit "A" for a schedule of payment dates).

4. That Plaintiff is ordered to pay one-half of all future unreimbursed medical and dental expenses of the minor children within thirty (30) days after notification by Defendant.

5. That Plaintiff shall, on or before October 1, 1989, execute an authorization to his medical and dental insurance company allowing Defendant to be able to make claims on behalf of the children directly to the company, or in the alternative the Plaintiff shall be the responsible party to arrange payment of all future medical and dental bills and submit all insurance claims.

6. That Plaintiff is entitled to equity from the marital home in the amount of $34,636.00, less one-half of the costs of sale. That the judgments awarded to Defendant shall be used to offset said equity owed the Plaintiff, and that the remaining balance of equity owed to Plaintiff not be disbursed to Plaintiff until such time as he demonstrates compliance with the terms of this order. Plaintiff shall be entitled to interest from the date this order is fully complied with to the date he actually receives said funds. Plaintiff is ordered to immediately execute a Quit Claim Deed to Defendant regarding said property.

7. That there is reason to believe the Plaintiff is in contempt of this court for not complying with the terms of the Decree of Divorce, however the matter of contempt shall be reserved until after October 1, 1989 to permit the Plaintiff to purge himself of any contempt by complying with this Order. If this Order is not complied with in full by the Plaintiff the matter

3

shall be referred to the District Judge for an evidentiary hearing and determination of the issue of contempt.

8. That the Defendant be awarded attorney fees in the amount of $1,000.

Dated this 3 day of ~~September~~ November, 1989.

APPROVED

Michael G. Allphin,
Commissioner

BY THE COURT

Richard H. Moffat,
District Court Judge

FILED IN THE 4TH
DISTRICT COURT UTAH COUNTY, STATE OF
UTAH
DATE 11/13/89
Katie Goodwin
DEPUTY CLERK

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing Order to the following:

Mr. Richard B. Johnson, Esq.
JOHNSON AND JACKMAN
1327 South 800 East, Ste. 300
Orem, Utah 84058

certified mail, postage prepaid this 28 day of September, 1989.

Stephen L. Henriod

4

0048

MEDICAL EXPENDITURES BY MARY LYNCH

12/31/82	$ 113.22
12/31/83	293.55
12/31/84	169.01
12/31/85	70.00
12/31/88	501.43
09/07/89	1727.35
	$ 2734.42

EXHIBIT "A"